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No. 87——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MELBA J. TAYLOR, *et al.*,
Petitioners,

v.

HUDSON PULP AND PAPER CORP., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. When a district court rules that a plaintiff has failed to establish a *prima facie* case of employment discrimination, should the court of appeals review this determination as a question of law under the plenary review standard or as a question of fact under the clearly erroneous standard?

2. When a district court fails to find facts that are essential to its judgment, may the court of appeals make supplementary findings and affirm on the ground that the findings—as supplemented on appeal—are not clearly erroneous?

LIST OF PARTIES

Pursuant to Rule 21(b), below is the list of parties to the proceeding sought to be reviewed:

Plaintiffs

Melba Taylor Knowles
Delphine Carter
Ethel Anderson
Vivian V. Earls
Carrie Branham
Gertrude Burroughs
Jessie Mathews

Defendants

Hudson Pulp and Paper Corp., a wholly-owned subsidiary of Georgia Pacific Corp.

United Paperworkers International Union (AFL-CIO)

Local Unions 641, 1565, 1717, 598, and 852, United Paperworkers International Union

Potential Class Members

Past, present, and future female employees of Hudson Pulp and Paper Corp.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners Melba Taylor Knowles, Jessie Mathews, Vivian Earls, Gertrude Burroughs, Delphine Carter, and Carrie Branham, respectfully request that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals affirming the judgment of the District Court is reported at 788 F.2d 1455 (1986), and is reprinted at App. 1a. The transcript of the oral opinion of the District Court is reprinted at App. 39a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1986 (App. 35a). A timely petition for rehearing and suggestion for rehearing *en banc* was denied by order dated June 25, 1987. (App. 37a). The jurisdic-

tion of this Court to review the Court of Appeals' judgment is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> * * * *
>
> (c) It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail to refuse to refer for employment any individual, in any way which would deprive or tend to deprive any in-

dividual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

STATEMENT OF THE CASE

A. *Procedural History*

This employment discrimination case was brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1982), by the petitioners, six women who were long-term employees of a paper mill operated by respondent Hudson Pulp & Paper Corporation ("Hudson" or "the company").[1] Petitioners claimed that Hudon's workforce was segregated by sex. Prior to and during the actionable period,[2] petitioners were employed as "bag catchers"—a position held exclusively by women; petitioners were denied promotions in their line of progression, which ostensibly led to the position of "baler" and then to machine operator; and petitioners

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[1] Melba Taylor (now Melba Knowles) and Jessie Mathews began working for the company in 1953 and were still working for the company at the time of trial. Vivian Earls began working in 1949; Gertrude Burroughs in 1950; and Delphine Carter in 1954; each of them retired in March 1977. Carrie Branham began working in 1951, left, returned in 1953, and worked until she retired in 1983. When the events which gave rise to this litigation took place, employees at the plant were represented by respondents United Paperworkers International Union (AFL-CIO), and Locals 641, 1565, 1717, 598 and 852. A seventh plaintiff, Ms. Ethel Anderson, did not appeal from the order dismissing her claim.

[2] Petitioners filed EEOC charges on September 30, 1976. Thus, the "actionable period" commenced on April 3, 1976. (App. 41a).

were barred from transferring to other departments of the plant where men worked at better paying jobs.

The case was tried in the United States District Court for the Middle District of Florida on July 23-26, 1984. At the close of petitioners' case-in-chief, the district court granted respondents' motion to dismiss on the ground that the individual petitioners failed to establish a *prima facie* case of sex discrimination on any of their claims. The Court of Appeals for the Eleventh Circuit affirmed by a vote of 2-1. In affirming, the majority held that the overall sufficiency of a plaintiff's *prima facie* case is to be reviewed under the clearly erroneous standard. In dissenting, Judge Thomas A. Clark concluded that some of the district court's findings were clearly erroneous and, in any event, remand was required because the district court failed to make other findings that were necessary to support its judgment.

B. *Evidence Adduced By Petitioners*

Before and during the actionable period each petitioner was assigned to the traditionally female job of "bag catcher" in the Grocery Bag Department. (App. 3a). Promotions within that department were, by reason of the collective bargaining agreement, to be awarded automatically (*i.e.*, without special application) to the employee with the greatest seniority in the job below the opening in the line of progression. The evidence showed that during the actionable period, there were 17 vacancies for the traditionally male position of "baler", a higher-paying job than "bag catcher." Each of the 17 baler vacancies was filled by a man even though petitioners and other women had greater seniority than each of the 17 men. At that time, the baler jobs were listed on the "Men's Work Schedule" that was posted by the Company. In addition, Howell Gordon, a staff supervisor in the Grocery Bag Department from 1962 until December 1976, testified that until late 1976, the company never awarded to a woman any job that was traditionally held

by a man in the Grocery Bag Department even though from 1974 through 1976, the collective bargaining agreement ostensibly provided a line of progression, based on seniority, from bag catcher to baler and then to machine operator. (App. 10a-11a; 14a-17a; 21a-22a). Mr. Gordon also testified that all vacancies in the Grocery Bag Department were allocated among employees according to their sex. (Tr. II 166-67).

Petitioners also offered evidence to show that women were barred from transferring to other departments where jobs were traditionally reserved for men. (App. 20a-24a). In this regard, the evidence showed that during the actionable period 39 vacancies arose in departments that had been traditionally staffed by men, and that at least 36 of those vacancies were filled by men. (App. 19a). These vacancies were entry-level positions and did not carry any special skill requirements.

Petitioners admitted that they did not apply for any of these 39 openings.[3] They testified that they believed that applying for such positions was futile in the light of the company's pervasive past and present discrimination against women. (App.30a-31a). In this connection, the evidence showed that during the actionable period, and indeed until as late as 1980, jobs were explicitly classified by sex on schedules posted in the Grocery Bag Department. (App. 11a-12a; 22a). Under the "Men's Work Schedule," the Company listed jobs such as baler that had been traditionally reserved for men. Under the "Women's Work Schedule," the Company listed jobs such as bag catcher that had been traditionally reserved for women. Moreover, only men were permitted to work

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[3] Petitioners did testify about positions in which they had been interested. Some petitioners made inquiries about these positions, although Petitioner Earls was the only one who before the actionable period (sometime in 1975 or 1976) made a formal application for transfer to a job traditionally held by men. Her application was rejected. (App. 31a-32a).

overtime in order to clean up the department. (App. 22a). In addition, during the actionable period and until December 1976, the compayn maintained two separate lists for assigning laid-off employees to temporary positions around the plant—one was for men and one was for women. (Tr. II 175-76; 183-84).

Petitioners also showed that a pattern of segregation by sex had existed throughout the plant before the actionable period.[4] That pattern remained virtually complete as late as four years after the actionable period. Thus, the statistical survey of Hudson's work force in 1980 showed that 13 production and maintenance departments had no women employees. In the Grocery Bag Department, where the petitioners worked during the actionable period, the 117 women employees were uniformly employed in jobs traditionally held by women, and the 36 men employees were uniformly employed in jobs traditionally held by men. (App. 12a; 22a).

C. *Rulings Below*

Ruling from the bench, the district court dismissed this case under Rule 41(b) of the Federal Rules of Civil Procedure on the ground that petitioners failed to establish a *prima facie* case of sex discrimination. (App. 39a). With respect to promotions within the line of progression

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[4] Petitioners offered evidence of the kinds of past discrimination that might shape and color an employee's understanding of present segregation in the plant. Thus petitioners showed that (1) until 1966, the collective bargaining agreement between Hudson and the union made clear that jobs were to be held only by men or only by women, and that hourly rates of pay for women were to be less than the rates for men; (2) after 1966, jobs in the plant continued to be allocated on the basis of sex; (3) when one of Hudson's departments was closed in 1970, plant officials permitted males in that department to transfer to jobs throughout the plant, but limited females to jobs such as "bag catcher" which had been held only by females (App. 23a-24a); and (4) the company also assigned laid-off employees, including petitioners, to temporary duty on the basis of sex. (Tr. I 54; II 22; 74; 96-97; 126; 209; 236-37).

from bag catcher to baler, the district court made no findings at all.

With respect to transfers to other departments, the district court held that there were no vacancies during the actionable period; even if there were vacancies, petitioners did not apply for the vacancies; and in any event, petitioners failed to show that it would have been futile for them to apply for the vacancies. (App. 41a). In this regard, the district court also ruled that by the time of the actionable period, 1976, Hudson no longer discriminated against women. The court based this statement on (1) an article in a company publication in 1974 entitled "Hey Lady, Wanna Be a Welder," which purported to encourage women to apply for jobs traditionally held by men; (2) the fact that between May 1974 and April 1976 five women in Hudson's workforce transferred to jobs that had been traditionally held by men;[5] and (3) the fact that the collective bargaining agreement in effect during the actionable period was facially neutral. (App. 42a-43a).

A divided panel of the Eleventh Circuit applied the clearly erroneous standard in reviewing the trial court's factual findings and its conclusion that petitioners had failed to establish a *prima facie* case of sex discrimination respecting promotions and transfers. (App. 1a).

Although the district court did not make findings respecting promotions, the panel majority said that 15 of 17 men had served as temporary balers and thus had "temporary seniority" that qualified them for promotion to the position of baler. The panel then said that the district court's "finding" on this issue was not clearly erroneous:

> "We recognize that appellants point to evidence indicating that two of the seventeen males had tempo-

[5] At that time, Hudson employed approximately 450 women. (P. Exh. 10).

> rary status in positions other than baler. . . . [But] [t]aking the evidence regarding this issue on the whole, the district court's finding on this issue was not clearly erroneous." (App. 11a).

In dissent Judge Clark concluded that the district court's judgment as to promotions could not be affirmed on the basis of the clearly erroneous standard because the district court made no findings at all about the 17 promotions to baler. (App. 16a). In addition, the fresh findings of the panel majority could not support its judgment because, even if the majority were correct about 15 of the 17 promotions, the majority admitted that in two other instances the men who were promoted had less permanent or "temporary" job seniority than any of the eligible women. (App. 15a-16a). Thus, in the dissent's view, petitioners had established a *prima facie* case of discrimination with respect to promotions to baler. (App. 19a).

The panel majority affirmed the dismissal of all transfer claims because no petitioner applied for a transfer during the actionable period, and "the evidence presented in this case fully authorized the district judge to find no . . . futility existed here" respecting applications for transfer (App. 13a). The panel also said that "[c]onsiderable evidence exists . . . that [petitioners] were aware Hudson was in fact actively encouraging women to apply for positions which had previously been occupied exclusively by men." (App. 7a).

The dissent concluded (1) that the district court's judgment could not be affirmed on the basis of the clearly erroneous standard because the district court did not make the necessary findings as to petitioners' belief about futility (App. 20a-21a), and (2) that the panel majority could not properly cure this gap by making appellate findings, including credibility findings, that were contrary to petitioners' testimony. (App. 27a-29a).

Petitioners requested rehearing or rehearing en banc on June 9, 1986, on the grounds that (1) there was an intra- and inter-circuit conflict as to whether the overall sufficiency of a plaintiff's *prima facie* case of employment discrimination is reviewed as a matter of law or as a question of fact under the clearly erroneous test; and (2) the panel majority ignored Supreme Court precedent by making its own findings of facts that were essential to support the district court's judgment on critical factual issues rather than remanding the case to the district court. After holding the petition for slightly more than one year, the court of appeals denied rehearing and rehearing en banc without explanation on June 25, 1987. (App. 37a).

REASONS FOR GRANTING THE WRIT

The courts of appeals are in sharp conflict over the appropriate standard of review to be applied in considering the sufficiency of a *prima facie* case of individual employment discrimination. Panels in the Fifth, Sixth, Ninth and Eleventh Circuits have treated the sufficiency of a *prima facie* case as a question of fact to be reviewed under the clearly erroneous standard; other panels in the same circuits have treated the sufficiency issue as one of law and have made a plenary review. The split within and among the circuits over the standard of review may frequently recur since employment discrimination cases make up a significant percentage of the cases litigated in the federal courts; and since the results reached on appeal may differ depending on whether the court of appeals defers to the trial court under the clearly erroneous test or makes a plenary review of the trial court's conclusion, this Court should decide which standard of review applies.

Certiorari is also warranted because the court below ignored decisions of this Court that require courts of appeals to forego making findings of fact that are essential to support the judgment of a district court. Under

these decisions, a court of appeals must remand the case to the district court rather than engage in appellate fact-finding in order to fill critical gaps in the district court's decision.

I. The Courts Of Appeals Are In Sharp Conflict Over The Standard Of Review To Be Applied When A District Court Concludes That The Plaintiff Has Failed To Establish A *Prima Facie* Case Of Employment Discrimination.

This Court has frequently discussed the types of proof that a plaintiff may adduce in the case-in-chief in order to raise a legally mandatory rebuttable presumption of employment discrimination—*i.e.*, a *prima facie* case. *E.g.*, *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-56 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 & n.13 (1973). The Court has also made clear that the factual elements of a *prima facie* case may vary from case to case. *McDonnell Douglas*, 411 U.S. at 802 n.13. As a consequence, the district courts often must decide whether the particular facts before the court establish a *prima facie* case. See B. Schlei & P. Grossman, *Employment Discrimination Law* 302 (2d ed. 1983-85 Supp.)

The courts of appeals disagree as to the standard of appellate review that should be applied in determining whether the particular facts before the district court established a *prima facie* case.[6] In the case at bar the panel majority concluded:

> "[T]he district court held that the appellants failed to establish a *prima facie* case. A district court's finding of fact will be reversed only if it is clearly erroneous, leaving the reviewing court with the

[6] Appellate review of any individual factual element of a *prima facie* case is made pursuant to the clearly erroneous standard. The disagreement in the courts of appeals relates to the overall conclusion as to whether the facts make out a *prima facie* case.

> definite and firm conviction that a mistake has been committed. After a thorough examination of the record, *we cannot conclude that the district court's finding is clearly erroneous.*" (App. 6a-7a) (citation omitted) (emphasis added).

On the other hand, in *Gay* v. *Waiters' and Dairy Lunchmen's Union*, 694 F.2d 531, 539-46 (9th Cir. 1982), one panel of the Ninth Circuit, per Judge Clifford Wallace, considered the issue at length, criticized other Ninth Circuit decisions that applied the clearly erroneous standard, and concluded:

> "The question whether the plaintiff has established a prima facie case is a question addressed to the district court not in its role as factfinder, but in its role as legal decisionmaker. The court must decide, at the close of the plaintiff's case-in-chief or otherwise, whether the plaintiff's evidence is legally sufficient to shift the burden of production to the defendant or, conversely, whether the defendant is entitled to judgment as a matter of law, without regard to whatever proof he has, or may, offer in rebuttal." 694 F.2d at 543 n.10.

The court agreed with those cases in the Ninth Circuit that hold that "whether the plaintiff's proof established a *prima facie* case, thus shifting the burden of production to defendant, is a legal conclusion freely reviewable on appeal." 694 F.2d at 540, 542-43.

In reaching this conclusion, Judge Wallace observed that the Supreme Court "may not yet have decided the question conclusively," but *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978) at least provides "significant guidance." 694 F.2d at 544 n.12. In *Furnco*, this Court observed that although the district court had "*concluded*" that no *prima facie* case had been made out, the court of appeals "was justified in concluding that *as a matter of law* respondents made out a prima facie case of discrimination under *McDonnell Douglas*." 438 U.S. at 572, 575 (emphasis added). Judge Wallace dis-

tinguished *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982), because that case arose under Section 703(h) of Title VII, which requires a showing of "actual intent" that "is not necessarily the same as the issue whether a prima facie case of discrimination has been made out by the plaintiff . . . ." 694 F.2d at 545, n.14. In this regard, Judge Wallace drew upon the *Pullman-Standard* Court's statement that "discriminatory intent [under § 703(h) of Title VII] means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive." 456 U.S. at 289-90.

The conflict over appellate review standards is not confined to *Gay* and the case at bar. Other panels in the Fifth, Sixth, Ninth and Eleventh Circuits have applied the clearly erroneous standard in reviewing the overall sufficiency of a plaintiff's *prima facie* case, as well as its constituent factual elements.[7] Still other panels in the

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[7] *Fifth Circuit*: *Uviedo* v. *Steves Sash & Door Co.*, 738 F.2d 1425, 1429 (1984), *cert. denied*, 106 S.Ct. 791 (1986) ("The magistrate's finding of a valid *prima facie* case was not clearly erroneous.").

Sixth Circuit: *Reynolds* v. *Humko Products*, 756 F.2d 469, 472 (1985) ("The district court held that appellant did not establish a prima facie case of discrimination and that he had not established disparate treatment because no black employees subject to less discipline had committed offenses of the same magnitude. These findings as well as the district court's ultimate holding must be affirmed unless clearly erroneous.").

Ninth Circuit: *Piva* v. *Xerox Corp.*, 654 F.2d 591, 594 (1981) ("In this circuit, the trial court's conclusions regarding the success or failure of the plaintiff and defendant in meeting [the *McDonnell Douglas*] burdens are reviewed under the clearly erroneous test.").

Eleventh Circuit: *Barber* v. *International Brotherhood of Boilermakers*, 778 F.2d 750, 760 (1985) ("[W]e cannot say that the district court's findings of a valid prima facie case is clearly erroneous."); *Maddox* v. *Claytor*, 764 F.2d 1539, 1547 (1985) ("The district court's finding [that plaintiff failed to make out a prima facie case] is not clearly erroneous."); *Lee* v. *Russell County Board of Education*, 744 F.2d 768, 771 (1984) (Affirming the district

Fifth, Sixth, Ninth and Eleventh circuits have reviewed the individual elements of the *prima facie* case as questions of fact, but have treated the overall sufficiency of the *prima facie* case as a question of law, subject to plenary review.[8] The Eighth Circuit also appears to adopt this position.[9]

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court because the panel "lack[ed] a definite and firm conviction . . . that the court erred in finding that plaintiffs failed to establish a prima facie case of discrimination under the *McDonnell Douglas* structure. . . ."). See also the dicta in *Morrison* v. *Booth*, 763 F.2d 1366, 1371 n.2 (1985) ("In a disparate treatment case . . . [w]hether a prima facie case has been shown is a fact question.").

[8] *Fifth Circuit*: *Zuniga* v. *Kleberg County Hospital*, 692 F.2d 986, 991 (1982) ("[W]e conclude as a matter of law that [plaintiff] established a prima facie case of sex discrimination . . . ." (disparate impact case)).

Sixth Circuit: *Lynch* v. *Freeman*, 817 F.2d 380, 388 (1987) ("We believe the district court erred as a matter of law in holding that the plaintiff failed to make a prima facie case . . ." (disparate impact case)); *Jackson* v. *RKO Bottlers of Toledo*, 743 F.2d 370, 377 (1984), *cert. denied*, 106 S.Ct. 3298 (1986) ("[I]t is not clear that the trial court was not influenced by . . . the related erroneous legal conclusion that plaintiff had failed to establish a prima facie case.")

Ninth Circuit: *Gay*, 694 F.2d at 539-42, collecting other Ninth Circuit cases. See also *Spaulding* v. *University of Washington*, 740 F.2d 686, 699, *cert. denied*, 469 U.S. 1036 (1984) (noting that courts in the Ninth Circuit have applied different standards); *Moore* v. *Hughes Helicopters, Inc.*, 708 F.2d 475, 480 (1983) (same).

Eleventh Circuit: *Nix* v. *WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1187 (1984) ("In concluding that [plaintiff] had made out a prima facie case, however, the court erred as a matter of law.") (citing *Gay, supra*) *Carmichael* v. *Birmingham Saw Works*, 738 F.2d 1126, 1130 (1984) ("Because the question is not whether the defendant *did* discriminate but rather whether the plaintiff is entitled to a *presumption* of discrimination, this inquiry is essentially a legal one.") (citing *Gay, supra*).

[9] *Legrand* v. *Trustees of Univ. of Ark. Pine Bluff*, 821 F.2d 478, 481 (8th Cir. 1987) ("When a district court erroneously fails to recognize a prima facie case under Title VII, a reviewing court can-

Some appellate courts avoid the conflict altogether by not mentioning the standard of review that is being applied. As *Gay* points out, at least four Ninth Circuit decisions fall into this category;[10] recent decisions in the Eleventh Circuit do the same.[11]

It is especially important for this Court to resolve the First Question presented by this petition because each year additional panels and new parties are likely to be drawn into the conflict among the circuits. According to the most recently available statistics, between June 30, 1985 and June 30, 1986, there were 1,730 appeals filed in the federal courts of appeals in employment discrimination cases. *Annual Report of the Director of the Administrative Office of the United States Courts* 165-66, Table B-7 (1986). That accounts for approximately six percent of the cases before the courts of appeals. To be sure, these statistics do not indicate how often the courts of appeals will be required to select or apply the proper standard for reviewing the sufficiency of a *prima facie* case; but the statistics and the sheer number of cases cited in notes 7-11 do suggest that the problem of selecting the correct standard of review will frequently recur.

When, as here, a trial judge decides to terminate an employment discrimination case by ruling that plaintiff has failed to satisfy a *prima facie* case, the result may

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not be certain whether this legal error colored the factual findings favoring the defendant.").

[10] *Gay, supra*, 694 F.2d at 542 n.8, citing *O'Brien* v. *Sky Chefs, Inc.*, 670 F.2d 864 (9th Cir. 1982); *Nanty* v. *Barrows Co.*, 660 F.2d 1327 (9th Cir. 1981); *Lynn* v. *Regents of the University of California*, 656 F.2d 1337 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982); *Correa* v. *Nampa School Dist. No. 131*, 645 F.2d 814 (9th Cir. 1981).

[11] *E.g.*, *Barnes* v. *Southwest Forest Industries, Inc.*, 814 F.2d 607 (11th Cir. 1987); *Welborn* v. *Reynolds Metals Co.*, 810 F.2d 1026 (11th Cir. 1987); *McCollum* v. *Bolger*, 794 F.2d 602 (11th Cir. 1986), *cert. denied*, 107 S.Ct. 883 (1987).

well differ depending on whether the appellate court defers to the trial court under the clearly erroneous standard, or makes a plenary review. As matters stand, however, a district court's ruling on the sufficiency of a *prima facie* case may be reviewed by the courts of appeals under the clearly erroneous standard, under the plenary review standard, or under standards that are not articulated at all. The Court should grant certiorari in order to provide a uniform standard of review.

II. The Court Of Appeals Ignored This Court's Rulings Enjoining Courts Of Appeals From Making Critical Findings Of Fact In The First Instance.

This Court has made clear that appellate review is subject to important limits that are intended to enhance the accuracy of the fact finding process and to separate that function from the review process. Thus, an appellate court may not affirm a trial court's judgment if the trial court has failed to make findings of fact that are essential to its judgment, and an appellate court may not *sua sponte* make the findings that would fill the critical gaps in a trial court's findings. *Icicle Seafoods, Inc.* v. *Worthington*, 106 S.Ct. 1527, 1529-31 (1986); *Anderson* v. *City of Bessemer*, 470 U.S. 564, 573-75 (1985); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-92 (1982); and *DeMarco* v. *United States*, 415 U.S. 449, 450 n.* (1974). When the district court's findings are incomplete in critical respects, remand—not appellate fact-finding—is the appropriate procedure. *Id.*[12] The court

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[12] In *Pullman-Standard*, for example, this Court said:

> "'[F]actfinding is the basic responsibility of district courts, rather than appellate courts, and . . . the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court.' *DeMarco* v. *United States*, 415 U.S. 449, 450, n.* (1974)." 456 U.S. at 291-92.

The Court added that "where findings are infirm because of an erroneous view of the law, a remand is the proper course unless

below plainly did not adhere to these rules of judicial procedure.

In connection with the promotion issue, the district court made no findings respecting petitioners' proof that 17 men were promoted to vacancies in baler jobs although the petitioners had greater seniority than the men selected. On appeal, the majority affirmed on the basis of the clearly erroneous test even though there were no findings at all. In support of affirmance, the majority made its own findings respecting 15 of the 17 promotion decisions. (App. 10a-11a).[13]

In connection with the transfer issue, petitioners contended that their failure to apply for transfer to other positions was excused, as a matter of law, because they "believed (with good reason, based on the experience of [their] co-workers) that it would be futile to apply for

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the record permits only one resolution of the factual issue. *Kelley* v. *Southern Pacific Co.*, 419 U.S. 318, 331-332 (1974)." *Id.* at 291-92.

[13] Even assuming the panel's findings were correct on this point, as a matter of law petitioners established a *prima facie* case of discrimination, because by all accounts of the evidence, two men were promoted over six women with greater seniority. As the dissent points out, two discriminatory promotions cannot be overlooked or rounded off by "taking the record as a whole." (App. 16a-17a). The courts of appeals have long recognized that there is no *de minimis* exception to the reach of Title VII, particularly when dealing with individual claims. *Cox* v. *American Cast Iron Pipe Co.*, 784 F.2d 1546, 1561 (11th Cir.), *cert. denied*, 107 S.Ct. 274 (1986); *Bolton* v. *Murray Envelope Corp.*, 493 F.2d 191, 195 (5th Cir. 1974); *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 354 (5th Cir. 1972). Quite simply, "[a] . . . balanced workforce cannot immunize an employer from liability for specific acts of discrimination." *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978). Furthermore, as the dissent observes, all 17 instances of favoritism towards junior male employees were actionable under a "continuing violation" theory; concerns about litigating otherwise stale claims disappear when similar discrimination extends into the actionable period. (App. 17a-19a). See *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 382-83 (1982).

the position[s]." *Garrett* v. *Okaloosa County*, 734 F.2d 621, 625 (11th Cir. 1984). *See also Cox* v. *American Cast Iron Pipe Co.*, 784 F.2d 1546, 1560 (11th Cir. 1986); *Reed* v. *Lockheed Aircraft Corp.*, 613 F.2d 757, 761-62 (9th Cir. 1980). In support of this contention, petitioners testified concerning the nature of their beliefs and presented evidence that showed that such beliefs were reasonably held. The district court, however, did not make any findings respecting any of the petitioners' justifiable beliefs about the futility of applying for transfers.[14] The court of appeals filled this gap by finding that petitioners "were aware Hudson was actively encouraging women to apply for positions which had been previously occupied by men." (App. 7a). This finding is extraordinary not only because it was made in the first instance by an appellate court, but also because it related to the credibility of witnesses.

In short, the panel majority did not confine its role to appellate review; it displaced the district court by actively engaging in fact finding on critical issues including credibility. The dissent contemporaneously admonished the panel majority to adhere to the traditional limitations placed on reviewing courts; the petitioners thereafter reinforced the admonition, on petition for rehearing, by stressing this Court's rulings in *Icicle Seafoods*, *Anderson*, *Pullman-Standard*, and *DeMarco*.[15]

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[14] Instead, the District Court found that in fact making applications for transfers would not have been futile. It did not examine whether any petitioner could have reasonably held a belief to the contrary in 1976. (App. 42a-43a). As the dissent points out, however, there was overwhelming evidence that petitioners believed that application would have been futile, and that this belief was reasonable. (App. 21a-33a). The dissent refers to the majority's statements to the contrary as "bald hyperbole." (App. 25a n.8).

[15] On appeal, the company (Br. pp. 22-23) quoted from *Anderson* that " 'appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*.' " 470 U.S. at 573.

Since the panel nevertheless chose to serve as a fact-finder as well as a reviewing court, its decision should be reviewed and reversed by this Court.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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September 23, 1987

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APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 84-3596

MELBA J. TAYLOR, *et al.*,
Plaintiffs-Appellants,

v.

HUDSON PULP AND PAPER CORPORATION, *et al.*,
Defendants-Appellees.

May 9, 1986

Appeal from the United States District Court
for the Middle District of Florida

Harry L. Witte, Jerry G. Traynham, Tallahassee, Fla., Richard T. Seymour, Mary Whisner, Washington, D.C., for plaintiffs-appellants.

Stuart Rothman, Perry M. Rosen, Roger A. Clark, Washington, D.C., for Hudson Pulp and Paper Corp.

Benjamin Wyle, New York City, for United Paperworkers.

Before HILL and CLARK, Circuit Judges, and MOYE *, Chief District Judge.

HILL, Circuit Judge:

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* Honorable Charles A. Moye, Jr., Chief U.S. District Judge for the Northern District of Georgia, sitting by designation.

FACTS

This appeal arises from the district court's grant of appellees' Fed.R.Civ.P. Rule 41(b) motion to dismiss appellants' claim on the grounds that they failed to establish a *prima facie* case of sex discrimination under Title VII, 42 U.S.C. § 2000e *et seq.* The appellants, Melba Taylor Knowles, Jessie Mathews, Vivian Earls, Gertrude Burroughs, Delphine Carter, and Carrie Branham, are six female former and present employees of the Hudson Pulp and Paper Corporation's [hereinafter "Hudson"] Palatka, Florida converting plant who allege they have been denied promotions and transfers within the plant because of their sex. Appellees, Hudson and various employee unions, deny that any employment discrimination has taken place within the actionable period and instead contend that they have attempted to remedy the effects of any previous discrimination by actively encouraging females to enter jobs traditionally held by males.

Because of the nature of this case, some elaboration on the organization of the mill is necessary. The facility, which employs approximately 1500 people, is divided into various departments. Within these departments jobs are often organized in lines of progression, such that there is a designated sequence of related jobs arranged in ascending order of skills. When a vacancy occurs at a given level in a line of progresison, the employee in the same line of progression with the highest job seniority in the level below the vacancy qualifies for the opening.

At the time of the suit giving rise to this appeal, only two departments in the plant, the grocery bag department and the tissue converting department, had a significant number of women employees. There also existed uneven distribution of men and women among the separate lines of progression within these two departments. Of particular importance in this case, the catcher quality line of progression within the grocery bag department had no men and 117 women while the machine line of

progression in that department had 36 men and no women.[1] Although the entry level jobs in the catcher quality and machine lines paid approximately the same, there was much greater potential to advance to a higher paying job in the machine line.

All six appellants worked in the multi-wall department until 1970. In mid-1970, all the employees in the multi-wall department were laid off and given the option of applying for temporary and permanent assignments in other areas of the mill. Under the transfer procedure set forth under the collective bargaining agreement in effect at the time of the multi-wall department closing, as well as during the actionable period, an employee seeking transfer to another department submitted a written request to the personnel department. It was not required that a vacancy in the job desired exist at the time of the request. When a vacancy occurred, the employee who had submitted a transfer request, was minimally qualified, and had the greatest mill seniority was offered the position. Appellants contend that they and other women were told at the time of the multi-wall layoffs that their only options of transfer were the grocery bag

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[1] Employees in the catcher quality line of progression advanced from bag catcher to either machine inspector relief or sample maker. Employees in the machine line of progression advanced from chute man to baler, to machine operator, and then to other jobs such as printer, molder, and oiler. The 1973 wage for Bag Catcher was $3.75 an hour for the first year and $3.755 thereafter. The rate for Sample Maker and Machine Inspector Relief was $3.955 an hour. The rate for Chuteman and Clean-up Man was the same as the rate for Bag Catcher, and the rate for Brokeman and for Baler during the first five weeks was the same as for Bag Catchers after one-year. After five weeks, Balers received $3.93 an hour, and after four years they received $3.985 an hour. Balers could be promoted to Machine Operator ($4.20 to $4.33 an hour) or to Pasteman ($4.18 to $4.49 an hour). Machine Operators could be promoted to Oiler ($4.39 an hour), to Head Baler ($4.54 an hour), to the Printer-Molder line ($4.38 to $5.18 an hour), or to the Adjuster line ($4.38 to $5.69 an hour).

department and the tissue converting department. In any event, each appellant requested and was granted a transfer to the position of bag catcher in the grocery bag department pursuant to the transfer procedure outlined above.

Effective June 1, 1974, a collective bargaining agreement was entered into which merged the two lines of progression in the grocery bag department and made all job titles gender neutral. This agreement was the one in effect during the charge-filing period. As a result of the merger, bag catchers could either (1) move up through the catcher quality line; or (2) transfer to the machine line above the position of chute loader. Thus, women employees could move up through the latter line of progression without having to work at the entry level position of chute loader. This action apparently was an effort to remove any barrier that the entry level position of chute loader, with its possibly prohibitive physical demands, created to women desiring to move into the machine line of progression.

In 1975 and early 1976, Hudson and the various employee unions negotiated two major changes in the 1974-77 collective bargaining agreement. The first, tentatively agreed to on January 23, 1976 and known as the "Amended Seniority Agreement," applied to all employees and served to abolish departmental seniority, leaving only job and mill seniority, rearrange lines of progression, and establish a transfer system whereby vacancies were posted and bid for at the time they occurred. The second agreement, known as "Special Seniority Procedures," was tentatively agreed to on March 25, 1976 and revised on April 22, 1976. It afforded significant preferential rights to black and female employees (labelled "designates") hired prior to the effective date of Title VII. Among these preferential rights were (1) the right to pre-bid for an entry level job when it was first posted within a department rather than waiting on the job to be

posted millwide; (2) the right to transfer their mill seniority with them to their new positions, so that incumbent employees could not invoke their greater job seniority against these designates with respect to future transfers, advancements, recalls, etc.; and (3) the ability to retain their same rates of pay if they transferred to lower paying jobs until they were promoted within their new departments or lines of progression to higher paying jobs. Both agreements were signed on July 20, 1976 and became effective as of October 18, 1976. Hudson and the various unions began briefing designates as to their rights on or about September 7, 1976.

On September 30, 1976, appellants filed substantially similar charges with the EEOC asserting they were denied promotions within the grocery bag department and transfers to other departments because of their sex. As only claims arising within 180 days prior to filing of charges with the EEOC are actionable, *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), the applicable charge-filing period within which appellants had to show acts of discrimination which injured them extended from April 3, 1976 to September 30, 1976. Specifically, each appellant alleged that she was allowed to transfer in 1970 only to a traditionally female job in the grocery bag department or tissue converting department and that because of the loss of her multi-wall seniority she was frequently laid off instead of male employees who had greater department seniority but less mill seniority. Five appellants also complained that there were specified jobs in the pulp mill which they could perform but that they could not take such jobs without losing their departmental seniority and risking unacceptable layoffs and that they were discouraged from moving up the line of progression to machine operator and above in the grocery bag department because they first had to work as a chute loader, a position which required the lifting of bales that were too heavy for most women to lift.

The EEOC processed appellants' charges and issued right to sue letters on May 13, 1977. Appellants then filed a class action complaint on behalf of all past, present, and future employees of Hudson on June 24, 1977. On May 2, 1979, after repeated changes of counsel, appellants filed their motion to certify the class, which was denied as untimely on December 16, 1983. The case was tried without a jury. At the conclusion of appellants' evidence, appellees moved to dismiss the action pursuant to Fed.R.Civ.P. 41(b), contending that appellants failed to establish a *prima facie* case of sex discrimination. The district court granted the motion. This appeal arises from that section by the district court.

DISCUSSION

We examine initially appellants' contention that the district court erroneously ruled that appellants failed to establish a *prima facie* case of Title VII sex descrimination. In order to establish such discrimination, a plaintiff must demonstrate: (1) that she belongs to a protected minority; (2) that she applied for and was qualified for a job for which the employer was seeking applicants; (3) that she was rejected; and (4) that the employer continued to seek applications from persons with similar qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed. 2d 668 (1973); *Perryman v. Johnson Products Co., Inc.*, 698 F.2d 1138, 1141 (11th Cir.1983). The district court determined that the appellants failed to prove that they applied and were rejected for vacancies for which they were qualified, that such vacancies existed, and assuming such vacancies existed that they were given to less qualified persons of the opposite sex. As such, the district court held that the appellants failed to establish a *prima facie* case. A district court's finding of fact will be reversed only if it is clearly erroneous, leaving the reviewing court with the definite and firm conviction that

a mistake has been committed. *Maddox v. Clayton*, 764 F.2d 1539, 1545 (11th Cir.1985). After a thorough examination of the record, we cannot conclude that the district court's finding is clearly erroneous.

We note initially that none of the appellants requested a transfer and was rejected during the 180 day charge-filing period established by the district court as extending from April 3, 1976 to September 30, 1976. Appellants assert that this is not fatal to their *prima facie* case as they refrained from applying for such transfers because of a justifiable belief that such requests would have been futile in light of Hudson's past discriminatory practices. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 368-71, 97 S.Ct. 1843, 1871-72, 52 L.Ed.2d 396 (1977); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 334 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978). Considerable evidence exists, however, that by the onset of the actionable period Hudson had abandoned any alleged discriminatory practices, was undertaking to remedy the effects of past practices, and that appellants were aware Hudson was in fact actively encouraging women to apply for positions which had previously been occupied exclusively by men.

The seniority agreements signed in July of 1976 afforded substantial preferential rights to blacks and women and involved extensive negotiations encompassing 1975 and early 1976. It is a reasonable inference that prolonged negotiations on such a sensitive issue would have created considerable controversy among the predominately male work force. In fact, the affidavit of appellant Knowles acknowledged that widespread hostility existed during the period the designate seniority was discussed and negotiated. Further, appellants were quite active in the union and attended numerous union meetings during the period the negotiations took place and at which these negotiations were discussed. Addi-

tionally, it is quite possible that appellants delayed requesting the transfer not because of any alleged past discriminatory practices on the part of Hudson, but rather so that they could take advantage of preferential seniority benefits afforded them pursuant to the seniority agreements of 1976. Sufficient evidence exists to create a credibility issue as to appellant's assertion that they were unaware of the seniority provisions until these provisions were discussed with the employees in September of 1976.

Other evidence further discounts the futility defense. In January of 1974, the company published in its monthly company newspaper an article entitled "Hey Lady, Wanna Be a Welder" which strongly encouraged women to transfer to jobs previously held by men.[2] Though appellants all denied that they had read or even heard of the article, four appellants did admit to having either received regularly, read, or seen other issues of the newspaper, and Mary Hilton, a witness for appellants

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[2] The article provided in part:

> [W]hat about discrimination because of sex? If a woman wants to be a welder, or wants to work on the craft paper machines or wants to try the tow-motor and load boxcars in one of the Shipping Departments, can she do it? Absolutely! All she has to do is put in a transfer . . . . After all, women proved they could weld during World War II right here close at home at the shipyards in Jacksonville. Similarly, if a woman is capable and willing to start out on the broke meters she then has the opportunity to work toward a machine tender. If she is willing to work in the lime kilns she can then be on the road to becoming a digester cook. This is the same route that the men take.
>
> So what about it ladies? You know a gal doesn't have to be a bra-burning women's libber in order to want to do something beside catch bags or napkins or pound a typewriter for eight hours. She just might be able to load that box car as good as any man; after all the tow-motor does most of the work. And if this is what she wants and if she can do the job, why shouldn't she be given the opportunity?

at trial and one of their fellow coworkers, testified on direct that she not only read the article but that it left a definite impression upon her. The June 1974 collective bargaining agreement rendered all job titles gender neutral as well as merged the lines of progression in the grocery bag department so that women employees could enter and advance in the machine line yet avoid what had previously been the physically prohibitive entry level position of chute loader. Between 1974 and shortly after commencement of the charge-filing period at least five women requested and received transfers to jobs traditionally held by men.[3] Evidence was introduced that one or more of the appellants knew each of the women. One of the women, Arta Mae Choate, had worked with appellants in the grocery bag department while another of the transferring women, Diane Suckow, was the step-daughter of appellant Knowles. Knowles' husband worked as an instrument mechanic in the mill, a position which enabled him to witness job changes throughout the plant and thus may have afforded him an opportunity to see one or more of these transfers. Moreover, it is reasonable to infer that had the cloud of discriminatory practices hung as heavily over the Hudson facility as appellants allege, any transfer of a female into a traditionally male position would have invoked considerable notoriety.

Also, it is also not entirely clear that appellants would have been willing to give up their departmental sen-

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[3] In May, 1974, Phyllis Smith transferred from tissue converting to the laboratory as a craft pulp tester, receiving temporary seniority. She became permanent in May of 1975. In October, 1974, Arta Mae Choate transferred from the grocery bag department, in which appellants were then working, to the position of store issues clerk on a temporary seniority basis. She became permanent prior to July 20, 1976. On August 25, 1975, Virginia Shepherd transferred to store issues clerk on a temporary basis and became permanent in 1979. On April 12, 1976, Diane Suckow, appellant Knowles' step-daughter, transferred to the wood receiving department as a wood checker. On April 19, 1976, Mary May transferred to the laboratory as a craft pulp tester.

iority and risk possible layoffs for the new positions. The known prospect of discriminatory rejection shows only that employees who wanted particular jobs may have been deterred from applying for them. It does not show which of the applicants actually wanted such jobs. *International Brotherhood of Teamsters v. United States*, 431 U.S. at 369, 97 S.Ct. at 1871. Appellants have not identified jobs which they actually wanted or expressed an interest in during the charge-filing period. Rather, they ask the court to assume they would have requested and received the jobs for which they subsequently pre-bid when Hudson implemented the preferential special seniority procedures. A nonapplicant's willingness to transfer into a position does not confirm her past desire for the job. Until the 1976 agreements an employee transferring to a different line would have been forced to forfeit her departmental seniority, so that she would be placed at the bottom of the seniority ladder with respect to the new line. This policy applied equally to men and women. Appellants asserted in their EEOC charges that they could not transfer to other jobs because such transfers would entail a loss of departmental seniority and the risk of unacceptable layoffs. Evidence thus exists that appellants delayed any contemplated requests for transfers not because of the prospect of discriminatory rejections, but rather because of the unattractive policy of loss of departmental seniority upon transfers to another line.

Regarding alleged denial of promotions within the grocery bag department, appellants introduced evidence that their failures to apply for such promotions when positions became available are irrelevant as the promotional procedures established by the collective bargaining agreement and company practice provided that upon the occurrence of such a vacancy the employee with the highest job seniority in that line of progression was offered the position and in fact was required to sign a

waiver if she did not want the promotion. Thus, rather than the employee approaching the employer, as was the case with the transfer procedure, in the promotional context the employer approached the employee. Even were we to find this the case, appellants still failed to establish a *prima facie* case of sex discrimination as substantial evidence exists that within the department no vacancy occurred for which any appellants were the most qualified. Although appellants allege that seventeen males junior to them in seniority were promoted to baler positions in the grocery bag department during the charge-filing period, it appears each of these males in fact had occupied a baler job on a temporary basis since 1975. As those with temporary status were pursuant to the collective bargaining agreement entitled to the first permanent opening, no promotion vacancies in fact occurred for which appellants were most qualified. We recognize that appellants point to evidence indicating that two of the seventeen males had temporary status in positions other than baler. They in turn contend that this supported their allegation that promotional vacancies occurred which were filled by males less qualified than appellants. Taking the evidence regarding this issue on the whole, the district court's finding on this issue was not clearly erroneous.

We are not unaware of evidence presented at trial indicating that Hudson continued its discriminatory practices through the actionable period or that even were such practices discontinued, appellants retained a justified belief that such practices remained in effect. Howell Gordon, a shift supervisor in the grocery bag department from 1962 until late December 1976, testified that irrespective of the 1974 collective bargaining agreement merging the lines of progression in the grocery bag department the practice of assigning only women to the catcher quality line and only men to the machine line continued. Further, jobs continued to be posted un-

der the heading "women's work schedule" and "men's work schedule." Appellants introduced at trial a statistical analysis of the company's work force as of 1980 indicating that 13 production and maintenance departments still had exclusively male permanent employees. Of the 1,073 permanent hourly employees in all departments, over 80 percent were men. An expert witness testified that the probability of the observed distribution of men and women by department occurring at random was only one chance in 10,000.

However, upon a thorough examination of the record and review of the testimony, we cannot conclude that the district court's findings were clearly erroneous. Much of the evidence upon which appellants relied pertained to conduct occurring prior to the actionable period or was merely the effects of discrimination practiced before the actionable period and which Hudson was actively attempting to correct. Regarding the statistical evidence introduced at trial and the expert testimony regarding that evidence, it is important to note that this statistical evidence represents merely a snapshot of the work force as it existed in 1980, and ignores the effect that the decrease in the total work force due to economic conditions had upon Hudson's ability to integrate women into positions previously traditionally male. In other words, as the total work force was decreasing, vacancies which could be filled by women seldom became available. Considerable evidence has been presented both that Hudson had abandoned any alleged discriminatory practices long before the onset of the actionable period and that appellants were not deterred from seeking transfers or promotions by the threat of discriminatory rejection. As to any conflicting evidence and testimony, where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *Anderson v. Bessemer City*, —— U.S. ——, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985).

While it may be and is clear that a nonapplicant may establish a *prima facie* case by showing that due to the employer's discriminatory practices the application would have been a futile gesture, the evidence presented in this case fully authorized the district judge to find that no such futility existed here. Indeed, the evidence is overwhelming that an application for transfer would not have been futile; such applications for transfer were actively solicited by the appellees and, when received, were granted.

Title VII states an important public policy of this nation. Where practices of employer units have not been in accordance with that policy, it is in the public interest that the former practice be speedily corrected. Discrimination in employment denies the members of a class their employment and promotional opportunities, providing only the opportunity of the class members and their counsel to sue. Compliance with the law expressed in Title VII and the national policy there represented affords all employees proper employment and advancement opportunities while eliminating such opportunities as may be represented by the rights of class members and their attorneys to sue. The federal courts do not have such affection for litigation that we ought to chill *bona fide* and constructive measures on the part of employers to abide the national policy lest their employees be thereby denied the opportunty to litigate and the courts be denied the opportunity to adjudicate. If the appellants in this action perceive litigation as a great benefit, the evidence supports the district judge's finding that, by the time they proceeded, the appellees had substituted the benefits of fair nondiscriminatory practices for what once may have been the benefit of a lawsuit. For these reasons we affirm the ruling of the district court that appellants failed to establish a *prima facie* case of sex discrimination.

Appellants raise a number of other contentions of error in their appeal. However, due to the disposition of the previous issue, it is unnecessary for us to examine these other alleged errors. Therefore, the decision of the district court is

AFFIRMED.

Appellants have also submitted a motion requesting that they be allowed to supplement the record on appeal. As this new material concerns an issue which we need not address in light of our disposition of the case, the motion is

DENIED.

CLARK, Circuit Judge, dissenting:

The record in this case clearly reveals that appellants met their prima facie burden of demonstrating sex discrimination in Hudon's promotion practices. This claim should be remanded to the district court for presentation of Hudson's case. With respect to appellants' discrimination in placement (transfer) claim, the district court failed to consider (or reveal how it considered) significant, relevant evidence. It also made critical errors of law. Rather than conducting our own fact-finding to determine whether the district court's judgment should be affirmed, we should remand this claim to the district court for proper consideration of appellants' futility argument.

I. *Promotions*

To understand appellants' promotion claim, it is necessary to know something about the way promotions at Hudson were to work under the relevant collective bargaining agreement. When a vacancy occurred in a permanent position, the person with the most temporary seniority in the vacant position was to be offered the

promotion. If no one held a temporary slot in the position or if the temporary employees declined promotion, the person with the most job seniority in the position previous in the line of progression to the vacant position would be promoted into the available job unless that person signed a waiver form declining the promotion. There was no need to apply for promotion or indicate any interest in it. The person next in line (in terms of job seniority) was automatically to be asked.

The bag catcher position, historically assigned to women, and the chute loader position, historically assigned to men, both fed into the baler position as of the merger of the lines of progression in the Grocery Bag Department in 1974. When a baler vacancy occurred, the most senior bag catcher or chute loader should have been promoted to baler, unless someone was already working as a temporary baler and was therefore entitled to preference.

In September, 1976, seventeen men were promoted to permanent baler positions. Fifteen of these were temporary balers and so properly given priority in promotion.[1] However, two of the promotions were given to men whose job seniority entitled them to no preference over appellants. One had temporary seniority as a "broke handler" dating back to January 30, 1976. He had moved into broke handling from chute loading and had mill seniority only as of July, 1975. The other had temporary seniority as a "bypass rich and joyce for

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[1] However, the original placement of the fifteen men in temporary baler positions was clearly discriminatory. These men, who had not only job but mill seniority that dated back only to 1975 or 1976, were made temporary balers before women who had job seniority dating back as far as the 1950's. No woman was offered a promotion. Because the original discrimination occurred before the limitations period, it cannot form the basis of appellants' prima facie case unless other instances of discrimination in promotion occurred within the period. *See infra* at 1464-65.

broke" and had mill seniority as of July, 1975. He had also been a permanent chute loader when placed in his temporary position. Appellants all had job seniority as bag catchers dating back to September, 1970. None was offered a baler position at the relevant time. As these men had neither temporary seniority as baler entitling them to preference in promotion nor sufficient job seniority as chute loaders to entitle them to promotion over appellants, appellants have clearly made out a prima facie case of discrimination in promotion falling within the limitations period.

The majority acknowledges the evidence presented by appellants to demonstrate that the two baler promotions were discriminatorily made, but fails to accord it any significance, saying only: "Taking the evidence regarding this issue on the whole, the district court's finding on this issue was not clearly erroneous." Majority Op. at 1461. I cannot understand the majority's approach to this issue. The district court did not discuss appellants' promotion claim, let alone make any findings with respect thereto. How, then, can the majority determine that the district court's finding on this issue is not clearly erroneous?

The district court discussed only the transfer claim. In that context, the district court found that no plaintiff had requested an intradepartmental transfer and that no vacancy had occurred during the limitations period. Record Excerpts at 63-64. To the extent that these may be considered findings bearing on the promotion claim, the majority's discussion reveals them to be clearly erroneous. Majority Op. at 1461. There is no dispute that there was no such thing as an "intradepartmental transfer" under the 1974-1977 collective bargaining agreement and that an employee was not required to request a promotion. Furthermore, there were at least seventeen vacancies in the permanent baler position during the limitations period. There is simply no basis for affirming

the district court's dismissal of the promotion claim. "Taking the evidence regarding this issue on the whole," fifteen nondiscriminatory promotions do not cure or in any way legitimate two discriminatory promotions.

It is true that appellants have demonstrated only two instances of discrimination within the limitations period while appellants number six. Appellants have alleged that the failure to promote women in the Grocery Bag Department is continuing discrimination. They need only demonstrate one instance of present discrimination within the period to be entitled to recover for other instances of the continuing discrimination that occurred before the onset of the limitations period. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982), the Supreme Court held, in the Fair Housing Act context, that "[w]here a plaintiff . . . challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice." *Id.* at 382-83, 102 S.Ct. at 1125. In *Havens Realty*, plaintiffs had alleged five separate instances of housing discrimination, only one of which fell within the 180-day limitations period. The other discriminatory acts had been suffered by a different plaintiff prior to the 180-day period, yet the Supreme Court held that all the claims were timely because they were all instances of one continuing violation.

The Court pointed out that staleness concerns disappear when a discriminatory practice is shown to have continued into the limitations period. If further reasoned that "wooden application" of the statute of limitations "ignores the continuing nature of the alleged violation" and "undermines the broad remedial intent of Congress." *Id.* Although the Court was not interpreting Title VII's statute of limitations, the reasoning of the Court applies equally in the Title VII context. Indeed,

the Supreme Court cited a Title VII case in explaining that application of a statute of limitations should reflect the broad remedial purpose of the law. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). Moreover, when plaintiffs show that discrimination continued into the limitations period, the court is assured that they challenge present discrimination rather than the present effect of past discrimination. *See United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977).

In this circuit, a plaintiff who has never filed an administrative charge may proceed in an action with a plaintiff who has properly filed charges if the issues they raise are similar. *See, e.g., Griffin v. Carlin*, 755 F.2d 1516, 1532 (11th Cir.1985) (class action); *Crawford v. United States Steel Corp.*, 660 F.2d 663, 665-66 (5th Cir. Unit B 1981) (multiple plaintiff non-class action). It is not clear from the facts or discussions in these cases whether nonfiling plaintiffs are limited to litigating claims that arose during the limitations period relevant to the charges that were filed. However, the courts reasoned that the purpose of requiring that charges be filed with the EEOC—to give the EEOC notice of and an opportunity to investigate discriminatory practices—is served when one charge is filed. Where, as here, the discriminatory actions that occurred prior to the limitations period were but instances of a practice shown to continue into the period, the same reasoning supports allowing all the plaintiffs to proceed on the charges that were timely filed. The EEOC was notified of and given a chance to investigate the discriminatory practice—failure to promote. "There is no question but that, if the employer has a formal rule or policy which discriminates in . . . allocaton of jobs . . . , and the system is maintained into the period, the system or practice can be attacked despite the fact that the plaintiff was not denied a particular job . . . within said charge-filing period."

B. Schlei & P. Grossman, *Employment Discrimination Law* 1050 (2d ed. 1983) (citing cases); *see also* C. Sullivan, M. Zimmer & R. Richards, *Federal Statutory Law of Employment Discrimination* 279-80 (1980).

There can be no dispute that the claims of appellants arose from the same discriminatory practice. All worked in the same department at the same position. All were denied the opportunity to be promoted to baler because, despite the formal merger of the bag catcher position into the baler line of progression in 1974, bag catchers (all women) were never offered the promotions due them under the collective bargaining agreement. Because two of the EEOC charges were timely filed, the district court had jurisdiction over the promotion claims of all six appellants. As pointed out earlier, appellants have demonstrated that all fifteen of the men promoted from temporary to permanent baler in September of 1976 were promoted to temporary baler in 1975 and early 1976 over appellants, who had more job seniority than any of the fifteen men receiving the transfers. There can be no doubt that each of these women has made out a prima facie case of sex discrimination in promotions, and each is entitled to return to the district court for the completion of the trial.

II. *Transfers*

The district court found that appellants failed to establish a prima facie case because they did not prove that they had requested transfers or that vacancies had occurred during the limitations period. Record Excerpts at 64. The finding regarding vacancies (not discussed in the majority opinion) is clearly erroneous in light of evidence that thirty-six entry-level openings outside the Grocery Bag Department were filled by men during the limitations period. *See* Appellants' Brief at 18a-23a (Table B); Plaintiffs' Exhibit 8. The majority affirms the district court's finding with respect to the failure to

apply and rejects appellants' claim that they did not apply for transfers because of a justifiable belief that such application would have been futile. In reaching its decision, the majority conducts substantial fact-finding that it should not, as an appellate court, conduct. I cannot agree with its decision to do so or with its factual conclusions.

Appellants' futility argument is based on *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). In that case, the Supreme Court recognized that:

> [t]he effects of and injuries suffered from discriminatory employment practices are not always confined to those who were expressly denied a requested employment opportunity. A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and were unwilling to subject themselves to the humiliation of explicit and certain rejection.

Id. at 365, 97 S.Ct. at 1870. The Court held that non-applicants could make out a prima facie case of race discrimination under Title VII. In applying *Teamsters*, a court looks to the existence of a belief in futility (the state of mind of the plaintiff) and the reasonableness of the belief (an objective inquiry). *See Garrett v. Okaloosa County*, 734 F.2d 621, 625 (11th Cir.1984); *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 761-62 (9th Cir.1980).

The district court made no finding as to the state of mind of appellants.[2] The district court instead framed the inquiry in objective terms: would it have been futile to apply? Record Excerpts at 64. The appropriate question is: Did appellants justifiably believe that application

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[2] In fact, all testified that they did not think that they were allowed to work anywhere in the plant but in the jobs historically assigned to women.

for transfer would have been futile because of Hudson's discriminatory practices? Framing the question correctly is crucial to identifying the evidence relevant to the fact-finding determination. Focusing on justifiable belief broadens the inquiry to include evidence of the plaintiff's career-long experiences with the employer's discrimination in all areas, as well as of the employer's actual practice during the limitations period, because such experiences would affect a female employee's expectations with regard to her transfer opportunities.

Any finding implicit in the district court's discussion that a belief in futility was not justified (or, for that matter, that application would not have been futile) is clearly erroneous. The court first found that only the testimony of Howell Gordon supported appellants' futility argument. Gordon, a supervisor in the Grocery Bag Department from 1962 until January, 1977, testified that even after the formal merger of the men's and women's lines of progression in 1974, he continued to assign women only to historically women's jobs (bag catcher or inspector) and men only to historically men's jobs (baler or machine operator). This practice continued through the limitations period.

This testimony, alone sufficient to demonstrate that appellants' belief in futility was justified and that the district court was clearly erroneous in finding that it would not have been futile to apply for men's jobs, was corroborated and supplemented with further evidence that Hudson continued to discriminate up to and through the limitations period. Male and female employees testified that they were unaware that the segregated lines of progression had been merged in 1974. As I have already mentioned, documentary evidence corroborates Gordon's testimony, and the employees' perception, by demonstrating that men were promoted into the baler position ahead of women with far more years job seniority. Appellants introduced Weekly Work Schedules denominating certain

jobs as "men's" and others as "women's." These separate listing of men's and women's jobs continued through the relevant period and into 1980. Hudson also maintained separate "Extra Boards"—on which laid-off employees were to indicate an interest in temporary jobs in departments other than those in which they permanently worked—for men and women.

The 1974-1977 collective bargaining agreement (as well as all such agreements through 1983) provided that female employees would be entitled to two break periods per shift not given to men, with the following exception:

> Female employees who, on or after December 1, 1965, move on to jobs not previously available to females, will not have available to them the two fifteen (15) minute rest periods referred to above.

Plaintiff's Exhibit 7-G at 60. Only men were allowed to work overtime, at overtime rates, to clean up in the Grocery Bag Department. Appellants' "snapshot" statistics demonstrate that fifteen years after enactment of Title VII, and four years after the actionable period in this case, Hudson's work force remained almost completely segregated by sex.[3]

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[3] Although appellants do not rely on their statistical evidence to establish prima facie proof of discrimination, the majority's possibly misleading discussion of the proper use of "snapshot" statistics in proving discrimination should be noted. The Supreme Court in *Teamsters, supra,* held that such statistics may be sufficient to establish a prima facie case of discrimination. 431 U.S. at 339, 97 S.Ct. at 1856; *see also Griffin v. Carlin,* 755 F.2d 1516, 1525 (11th Cir. 1985). Thus, it is the defendant's burden to refute "snapshot" statistics by offering more refined and accurate statistics such as "flow" statistics showing employment patterns as they occurred over time. *See Movement for Opportunity and Equality v. General Motors Corp.,* 622 F.2d 1235, 1245 (7th Cir. 1980). The defendant may not successfully rebut stark statistical evidence of segregation by pointing to a declining work force, as the majority contends, for it is the employee turnover rate, not the overall number of employees, that determines the number of

All this evidence relates to discriminatory practices contemporaneous to the actionable period that would influence a female employee's perception of her mobility within the Hudson plant. Because the appellants' perceptions were shaped by previous experiences with their employer,[4] the aforementioned evidence must be viewed against the backdrop of Hudson's long history of sex segregation and discrimination.

The collective bargaining agreements through 1966 set forth separate starting rates and base rates for men and women, with women's rates lower than men's. Women's jobs within each department were designated as such in the collective bargaining agreement. This blatant sex segregation continued until January, 1966, six months after the effective date of Title VII.[5] Thereafter, most sex-specific job titles were removed from the contract, but some remained: "Matron," "Broke Man," "Chute Man," "Pasteman." There is no evidence that Hudson made any further effort to eliminate sex segregation before 1974.

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vacancies. *Teamsters*, 431 U.S. at 341, 97 S.Ct. at 1857. So long as the number of new hires were less than the number of departures, the employer could hire in significant numbers while experiencing an overall decline in work force.

If snapshot statistics may form the basis of a prima facie case of discrimination, there appears to be no reason to consider such statistical evidence irrelevant to the justifiability of a belief in futility due to the employer's discrimination. If a court may infer that a rigidly segregated work force reflects discriminatory practices, it must grant that similar inferences drawn by employees are justified. As the statistics presented in this case are as stark as those before the Court in *Teamsters*, I would give them considerable weight in assessing whether appellants' belief—that applying for transfer into historically male jobs would be futile in light of the employer's discriminatory practices—was justified.

[4] Melba Taylor (now Knowles), Jessie Mathews, Vivian Earls, Gertrude Burroughs, Delphine Carter and Carrie Branham were hired in 1953, 1953, 1949, 1950, 1954 and 1953, respectively.

[5] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e was enacted on July 2, 1964 and went into effect on July 2, 1965.

Practices in the Multiwall Department, where appellants worked until 1970, reflected the sex segregation formally established in the collective bargaining agreements. Women worked at certain jobs that, until January, 1966, had sex-specific titles. Men worked at other jobs. When the Multiwall Department was relocated to a distant city and appellants were forced to transfer to new jobs, they were told that they could transfer only to the Grocery Bag Department or the Tissue Converting Department, the two departments that had women-only lines of progression. The male Multiwall employees transferred to jobs in many other departments.

After their transfers, Hudson continued to communicate to appellants that women were allowed to fill only certain positions. As Howell Gordon testified, job assignments in the Grocery Bag Department continued to be made according to sex through January, 1977. Indeed, the district court found that "sex was involved to some extent in where individuals were placed, from the period of 1970 to at least 1974." Record Excerpts at 62.

Ignoring most of the evidence that Hudson continued to discriminate through the limitations period, the district court relied on three pieces of evidence to find that it would not have been futile to apply to transfer to a male department or job: (1) the merger of the bag catcher (female) and machine operator (male) lines of progression in the 1974 collective bargaining agreement; (2) the successful transfer of a few women into historically men's jobs (three had transferred prior to the commencement of the limitations period; another two transferred during the limitations period); (3) the 1974 publication of an article in the Hudson newsletter indicating that women could transfer into historically men's jobs. Rejecting Mr. Gordon's testimony—direct evidence that sex discrimination continued through the limitations period [6]

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[6] Because plaintiffs presented direct evidence of discrimination, it would have been Hudson's burden to prove that it would have

—the district court found that application would not have been futile and that appellants had failed to establish a prima facie case of sex discrimination. It did not find that appellants did not believe application would have been futile. Nor did it find that any such belief would not have been justified.

The majority, also ignoring most of the evidence that Hudson continued to discriminate,[7] finds that the evidence upon which the district court relied supports the conclusion that "[c]onsiderable evidence exists . . . that by the onset of the actionable period Hudson had *abandoned* any alleged discriminatory practices, was undertaking to remedy the effects of past practices, and that appellants were aware that Hudson was in fact *actively encouraging* women to apply for positions which had previously been occupied exclusively by men." Majority Op. at 1459 (emphasis added).[8] To do so, it must find that appellants

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made the same decisions even in the absence of the discriminatory motivation. *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1559 (11th Cir. 1986); *Lee v. Russell County Board of Education*, 684 F.2d 769, 774 (11th Cir. 1982).

[7] Although the majority acknowledges evidence that tends to justify belief in futility and, more generally, to bolster appellants' prima facie case, it concludes that the district court's (unspecified) findings were not clearly erroneous. Majority Op. at 1461. If the findings to which the majority refers are the findings with respect to justified belief in futility, its discussion of the evidence misses the point. It does not matter that discriminatory practices took place before the actionable period so long as the nonapplicant's belief in futility arising from those practices justifiably continued into the limitations period. As many of the instances of discrimination not falling within the limitations period occurred immediately prior to the relevant period (not to mention the practices that continued throughout the period), these instances, at least, should be weighed in support of appellants' position.

[8] Considering the evidence recounted above that Hudson continued to discriminate past the actionable period, the majority's statement is bald hyperbole. However laudable Hudson's initial efforts to end its discriminatory practices and desegregate its work

were aware of the steps taken by Hudson, a leap the district court did not make, and infer that appellants could not justifiably have retained a belief in futility in the face of this awareness.

Its effort is unconvincing. None of the appellants had seen the "Hey Lady, Wanna Be a Welder" article. Furthermore, although each appellant testified that she "knew" one or the other of the women who had successfully transferred into "male" positions, each also testified that she did not know about the transfers. It appears from the testimony that appellants' acquaintance with the transferees was minimal and is more accurately reflected in stating that appellants knew who the transferees were than in stating that appellants knew them. Even if it can reasonably be inferred that appellants were aware that a very few women had successfully transferred, *Teamsters* demonstrates that evidence of visible tokenism should not defeat a futility claim. In that case, the Supreme Court in no way indicated that the fact that five Spanish-surnamed individuals had been hired as line drivers prior to filing of the law suit would preclude all Spanish-surnamed nonapplicant class members from participating in the superseniority remedy. *See Teamsters*, 431 U.S. at 337, 362-71, 97 S.Ct. at 1855, 1868-73; *see also Bing v. Roadway Express, Inc.*, 485 F.2d 441, 451 (5th Cir.1973) ("Certainly a few . . . have the courage to fight 'the system,' but it is equally certain that others must have been intimidated and discouraged by [the employer's] practices."). Finally, paper merger of historically sex-segregated lines of progression does not render unjustified a belief in the futility of application for trans-

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force, the fact remains that its attitude toward discrimination, as revealed in its practices, remained equivocal at best. Far from "[c]onsiderable evidence" that Hudson "abandoned" discrimination, there is considerable evidence that Hudson wanted to have its discrimination and avoid lawsuits, too. Any interpretation of the record that sees active encouragement of desegregation is likewise wishful thinking.

fer when testimony by the person responsible for putting paper into practice reveals that the merger was not effectuated during the relevant period. One does not have to credit the testimony of male and female (plaintiff and non-plaintiff) witnesses that they were unaware of the formal merger to find that the paper merger in no way supports rejection of the futility argument.

In addition to the evidence recited by the district court, the majority leans heavily on its own inferences drawn from the fact that a superseniority agreement for the benefit of women such as appellants was negotiated and signed by Hudson and the unions during the limitations period. The fact that a superseniority plan was in the works during the limitations period may be relevant to the futility assessment in two ways. First, it may be considered to have demonstrated to appellants that Hudson was willing to allow them to break into formerly all-male positions. Second, it may be offered to support the contention that appellants refrained from applying to take advantage of the upcoming transfer benefits rather than because of Hudson's entrenched discrimination. The second point goes to whether any justifiable belief actually caused the failure to apply, which will be discussed below.

The first point reflects on whether the appellants' asserted belief that they could not transfer into male-only jobs was justified. If appellants knew about the negotiations, perhaps they should have realized that Hudson was willing to allow previously forbidden transfers. The majority suggests that appellants were aware that the designate plan was being discussed during the limitations period. However, appellants testified that they were unaware that the designate seniority plan had been adopted until Hudson held meetings in the fall of 1976 to inform the employees of the terms of the agreement. It is true that an affidavit given by Melba Knowles in 1982, which states that there was widespread hostility toward the

designate seniority plan during the time the plan was being discussed and negotiated, conflicts with her testimony. The affidavit is the only evidence that any of the appellants knew or should have known of the plan before September, 1976. It does not prove that Knowles was aware of the plan throughout the limitations period, the conclusion that must be reached to defeat her futility argument. Nor does it reveal the level of detail of any knowledge that may be inferred to have existed. There is no evidence that appellants "attended numerous union meetings during the period the negotiations took place and at which these negotiations were discussed." Majority Op. at 1459-1460. Appellants' testimony disclosed only that some of them were active in the union at some unspecified point in their twenty-plus year careers with Hudson and that some of them attended an unspecified number of meetings at unspecified times during 1975 and 1976. There was no evidence presented that the designate plan was discussed at any meeting, let alone at any meeting attended by an appellant. Thus, the determination whether appellants knew anything about the designate plan that should have communicated to them Hudson's willingness to allow women into men's jobs is purely a matter of credibility assessment. The district court made no finding one way or the other, and the majority is in no position to resolve a credibility dispute.

Assuming, however, that appellants were fully aware that Hudson and the unions were negotiating a plan that would allow women and blacks to transfer into previously segregated jobs, the question remains whether this knowledge would render incredible or unjustified any belief in the futility of applying for a transfer prior to the effective date of the plan. On the facts of this case, given appellants long experience with Hudson's discriminatory practices, I can only conclude that the credibility of appellants' belief that they *could not* transfer is not weakened by such knowledge. Rather than understanding

Hudson's participation in negotiations to mean that they were free to transfer into men's jobs, women such as appellants may have understood negotiations to represent a battle over the means by which they would be admitted to forbidden territory; implementation of the plan, and not Hudson's willingness to negotiate (if any can be presumed), would signal the end of discrimination. Thus, it would be reasonable for appellants to have believed that they would be allowed to transfer to "men's" jobs only through, and because of, the designate program. Their knowledge that the plan might take effect ought not be equated with belief they could transfer prior to the effective date.

Hudson's history of sex discrimination and appellants' extensive and intimate familiarity with it, as well as the evidence of discrimination occurring within the limitations period, establishes that appellants' belief that they would not be allowed to transfer out of women-only jobs was credible and justified. However, I realize that to reach this conclusion I have had to indulge in the same kind of fact-finding for which I have taken the majority to task. As the district court did not make findings one way or the other on the issue of the existence and justifiability of appellants' belief in futility, and erred in finding application would not be futile, I would remand to the district court to make findings consistent with the correct legal standard. I cannot join in the majority's factual determinations [9] or the legal conclusions resulting therefrom.

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[9] Once again I must point out that the majority's sweeping conclusions with respect to factual issues are unsupported by the record. In particular, I refer to the reiteration that "considerable evidence has been presented . . . that Hudson had abandoned any alleged discriminatory practices long before the onset of the actionable period . . .," Majority Op. at 1461, as well as the statement that "the evidence is overwhelming that an application for transfer would not have been futile; such applications for transfer were actively solicited by the appellees and, when received, were granted."

I am also troubled by the majority's treatment of the question whether appellants have demonstrated that they did not apply *because of* their belief in the futility of application. The majority states that appellants did not identify jobs they actually wanted or in which they expressed an interest during the limitations period but relied on their designate program bids to prove their interest. Majority Op. at 1460. However, appellants do not claim that their willingness to transfer under the designate program proves that they would have transferred prior to implementation of the program if they had not believed that application would be futile. Rather, each testified that she would have transferred if she had realized she would be allowed to do so. This evidence is sufficient to show that appellants' failure to apply was caused by Hudson's discrimination. Appellants need not demonstrate that they actually expressed desire for particular jobs, for the plaintiff's task is to prove that "he would have applied for the job had it not been for those practices." *Teamsters*, 431 U.S. at 368, 97 S.Ct. at 1871; *see also Cox, supra*, at 1560. Although the Court in *Teamsters* indicated in a footnote that such proof might take the form of evidence of an informal inquiry, expression of interest or unexpressed desire, *id.* 431 U.S. at 371 n.58, 97 S.Ct. at 1873 n.58, its discussion makes clear that these are all just means of identifying the "choice an employee would have made had he previously been given the opportunity freely to choose . . . ." *Id.* at 371, 97 S.Ct. at 1873. An employee who can show that she would have transferred into a "man's" job if not for discriminatory practices that led her to believe such a step would be out of the question has demonstrated that she would have chosen to transfer.[10]

Majority Op. at 1462. The factual questions are far more difficult than the majority would have them. Furthermore, there is no evidence that all applications for transfer were granted.

[10] The majority's emphasis on proof of interest or desire places beyond the scope of Title VII the most entrenched forms of sex

Appellants had all worked for Hudson for over twenty years as of the beginning of the limitations period. For over twenty years, Hudson had communicated to appellants that certain jobs were for women, and women only, while others—the better-paying jobs—were for men and men only. Because these women had worked only for Hudson for all or the great majority of their working years, their belief that they could not work in men's jobs may be attributed to their experience with Hudson's discriminatory practices. Their testimony that they would have transferred into "men's" jobs if they had known they could should be credited as proof that Hudson's discrimination caused their failure to apply for transfers.

Even under the majority's interpretation of appellants' burden, several of the appellants should be found to have succeeded in carrying it. Vivian Earls applied and was rejected for a printer position sometime in 1975 or 1976 (before commencement of the limitation period).[11] Carrie Branham testified that she had been interested in the jobs of baler and machine operator. Jessie Mathews

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discrimination. Sex discrimination has been marked by its segregation of women into work roles different (not merely separate) from those performed by men. The woman who has been most thoroughly victimized by sex discrimination will believe she is limited to those jobs traditionally assigned to women. She will not realize she wants a "man's" job. Yet, when a woman's desire for a job is not translated into a formal application because the sex discrimination with which she lives has become internalized to the point she believes herself to have no choices, she is as much a victim of discrimination as is she who can envision herself working at a "man's" job and turns that vision into desire. To hold that the first woman is not protected by Title VII "put[s] beyond the reach of equity the most invidious effects of employment discrimination—those that extend to the very hope of self-realization." *Teamsters*, 431 U.S. at 367, 97 S.Ct. at 1871.

[11] Evidence of interest expressed prior to the actionable period is relevant. *Teamsters*, 431 U.S. at 371 n.58, 97 S.Ct. at 1873 n.58 (overt act such as *pre-Act* application would be most convincing proof that futility caused failure to apply).

testified that she would have moved into the tissue pulp tester job if given the opportunity. Melba (Taylor) Knowles asked the labor relations manager, Bob Garrett, if she could transfer to the lab when Multiwall was phased out in 1970. She also asked Carl Kight, a union official, about becoming a baler in early 1976.

The majority fails to acknowledge this evidence and rejects appellants' testimony that they would have applied to transfer to the better-paying "men's" jobs if they had realized women were allowed to do so, finding instead that "evidence . . . exists that appellants delayed any contemplated requests for transfers not because of the prospect of discriminatory rejections, but rather because of the unattractive policy of loss of departmental seniority upon transfers to another line." Majority Op. at 1461.

The evidence cited by the majority, appellants' EEOC charges, does not, however, contain assertions that "they could not transfer to other jobs because such transfers would entail a loss of departmental seniority and the risk of unacceptable layoffs." *Id.* The charges state that they were not permitted to transfer because they were women. They also state that if they were allowed to transfer they would be subject to layoff despite their twenty-plus years of mill seniority. They did not say or imply that they would not transfer *because* of the loss of seniority. Obviously, that they felt it was unfair and discriminatory that they should always remain at a disadvantage to more junior male employees does not tell us whether they would have been willing to risk departmental seniority to transfer to better-paying jobs. There is no other evidence that they were deterred by neutral disincentives in the collective bargaining agreement. If we are going to infer anything from the bare fact that the collective bargaining agreement contained disincentives to transfer, we may as well infer that appellants were deterred by the loss of two fifteen-minute breaks per shift, a

gender-specific disincentive. *See supra*, p. 1461. We would not be required to reject appellants' futility argument were we to do so. I see no reason to choose one inference over the other.

Moreover, there is no evidence that appellants delayed their applications to take advanatge of the designate program or had any reason to do so. *See* Majority Op. at 1460. Nothing in the record or, more particularly, in the Special Seniority Procedures indicates that a woman who transferred or applied to transfer prior to the effective date of the designate program would be barred from participating, or in any way disadvantaged if allowed to participate, in the designate program. There is no basis for the majority's inference that anticipation of the designate program, rather than appellants' belief in futility, deterred them from applying for transfer into "men's" jobs during the limitations period. There being no evidence that appellants were deterred from applying by other gender-neutral considerations, I would accept their testimony that they would have applied for "men's jobs had they not been led to believe they would not be allowed to take such jobs.

III. *Conclusion*

Ultimately, the question to be answered in this case is whether appellants were victims of intentionally discriminatory practices of which the EEOC was timely apprised. My review of the record leaves me with the definite and firm impression that the district court erred in failing to find that appellants' evidence raised a rebuttable presumption that they had indeed suffered such discrimination. That Hudson took steps to end some of its discriminatory practices does not lessen or eliminate its liability for the discrimination experienced by appellants. An employer may not "substitute" present efforts to remedy discrimination for liability for past discrimination. Majority Op. at 1462. Neither does the law support the district court's finding that "any discriminatory

practices prior to 1974 was [sic] cured by the [1974-1977] collective bargaining agreement, which on its face is facially neutral." Record Excerpts at 63. We may not dismiss a sex discrimination case against an employer because we fear it will "chill *bona fide* and constructive measures to abide [sic] the national policy [embodied in Title VII]." Majority Op. at 1462. As the Supreme Court recognized in *Teamsters:*

> The company's later changes in its hiring and promotion policies could be of little comfort to the victims of the earlier post-Act discrimination, and could not erase its previously illegal conduct or its obligation to afford relief to those who suffered because of it.

341 U.S. at 341-42, 97 S.Ct. at 1858. Regard for an employer's attempt to change its way should not influence our assessment of its liability for actions that are not as worthy of regard.

Appellants have demonstrated that there occurred during the limitations period vacancies for which they were qualified and for which they would have applied if not for their justified belief, based on Hudson's discriminatory practices, that to do so would be futile. I conclude that the district court committed legal and factual errors in analyzing appellants' transfer claim and in holding that plaintiffs had not established a prima facie case. Those errors should require us to remand this case for fact-finding on the issues whether Hudson's past and present discriminatory practices led appellants to believe they would not be allowed to transfer and, if so, whether this belief in the futility of application actually explains appellants' failure to apply. Furthermore, as the record clearly shows that appellants established a prima facie case of continuing sex discrimination in promotions, I would reverse the district court's dismissal of that claim and remand for completion of trial. The majority determines otherwise and so I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3596

D.C. Docket No. 77-00464

MELBA J. TAYLOR, *et al.*,
Plaintiffs-Appellants,

v.

HUDSON PULP AND PAPER CORPORATION, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

Before HILL and CLARK, Circuit Judges, and
MOYE*, Chief District Judge

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of

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* CLARK, Circuit Judge, dissented and filed an opinion.

the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: May 9, 1986

For the Court: SPENCER D. MERCER
Clerk

By: /s/ Miguel J. Corte, Jr.
Deputy Clerk

ISSUED AS MANDATE: July 14, 1987.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3596

MELBA J. TAYLOR, *et al.*,
Plaintiffs-Appellants,

v.

HUDSON PULP AND PAPER CORPORATION, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion May 9, 1986, 11 Cir., 198 , —— F.2d ——).
(June 25, 1987)

Before HILL and CLARK, Circuit Judges, and
MOYE*, Chief District Judge

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service

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* Hon. Charles A. Moye, Jr., Chief U.S. District Judge for the Northern District of Georgia, sitting by designation.

on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Docket No. 77-464-Civ.-J-JHM

MELBA J. TAYLOR, *et al.*,
Plaintiffs

—VS—

HUDSON PULP AND PAPER CORPORATION, *et al.*,
Defendants.

July 26, 1984

4:25 p.m.

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JOHN H. MOORE II

* * * *

THE COURT: I apologize for the delay. I have been wading through some evidence here.

The Court has before it the defendants' motion for involuntary dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. It's the Court's intention to grant those motions. First of all, with regard to the plaintiff Anderson, there has been no evidence whatsoever adduced at the trial in the plaintiffs' case that would warrant any further consideration and the motion is obviously granted as to her.

The Court finds that in accordance with Texas Department of Community Affairs versus Burdine, that there is in fact a three-part procedure which must be followed and that is, first of all, that the plaintiffs must prove a

prima facie case, after which the burden of going forward at least does shift to the defendants to show that there was a legitimate business reason or some legitimate reason for conducting themselves the way they did, and then finally for the plaintiff to have an opportunity to come back and show that the defendants' reasons were merely a pretext.

A prima facie case, as that term is used in Title 7 litigation, in accordance with the Burdine case, is the establishment of a legally mandatory rebuttable presumption as opposed to merely enough evidence to permit the tryer of fact to infer the fact at issue. With that definition in mind, the Court finds that this case had its genesis in the phase-out of the multi-wall department in 1970, and that the plaintiffs were laid off as a result of that phase-out. That thereafter, the plaintiffs were recalled on a hit or miss basis and that they were assigned either to the bag department or to the tissue converting department. Although there is insufficient evidence for the Court to determine whether those recalls were based on sexual differences, it would appear at least that sex was involved to some extent in where the individuals were placed, from the period of 1970 to at least 1974. 1974, the union—and for purposes of this dissertation of the fact-finding, the union will be considered collectively as all of the unions—and the company negotiated a collective bargaining agreement which in effect eliminated the previous practice of male lines of progression and female lines of progression.

Prior to 1974 if there was any act of discrimination, certainly it would be barred by the statute of limitations as contained in Title 7.

In 1976, January thereof, the union and the company again modified its—or their respective positions by the change in the seniority plan, eliminating department seniority and granting to all persons, regardless of sex, mill seniority.

I might digress here to say that any practices which existed in 1976 and thereafter, the Court finds were practices that would constitute present effects of past discrimination as opposed to present discrimination. The Court also finds that any discriminatory practices prior to 1974 was cured by that collective bargaining agreement, which on its face is facially neutral.

The complaints with the Equal Employment Opportunity Commission, EEOC, were filed with that commission on September 30, 1976. One of them, and I believe it was—and I so find that Miss Anderson's complaint was filed on October 4, 1976. With the exception of Miss Anderson, the rest of them were signed on July 28th, 1976, after which someone, whoever it might have been, filled in the date of September 22, 1976, and apparently then mailed them to the EEOC which received them on September 30th. One hundred eighty prior to September 30th is April 3. From nineteen—from January 1976 after the seniority plan was amended, or was changed in January 1976 and amended on April 22, 1976, at any time after January the plaintiffs could have used their seniority to—that is, plant-wide or mill-wide seniority—to transfer inter-department and in effect could have applied for any job they wanted to apply for, and would have received that job had their plant-wide or mill-wide seniority put them first in line. The Court finds that no plaintiff requested a transfer, either intra- or inter-department, and that the plaintiffs have failed to prove that had they so requested such a transfer, that there was a vacancy existing between April 3 and September 30 of 1976, or for that matter as counsel in this case has used the date of March 26, 1976, the same would be true from then until September—through September of '76.

It's the Court's opinion that this is the precise type of case which cries out for the application of the Burdine case as well as the McDonnell-Douglas case, and that the failure of the plaintiffs to prove that they applied for

a vacancy for which they were qualified and rejected and prove that there was in fact such a vacancy, operates to defeat their claims. Further, that there was no showing and no proof that the vacancy for which they would have applied, if there had been such a vacancy, was given to a person of the opposite gender.

Now, the plaintiffs would argue—before I get to that, in addition to what the Court has already found, the Court also finds that there were transfer provisions within the 1974 to 1977 collective bargaining agreement, which is Plaintiff's Exhibit 7 G, for transfer within departments or inter-department and also for the use of mill-wide seniority. All of these were in effect prior to the 180-day operable period prior to the filing of the EEOC complaint. Now, the plaintiffs would argue that it was futile to apply for a position because of the pattern and practice of the defendants in continuing to confine positions in the traditionally male lines of progression to men and the traditionally female lines of progression to females. With one exception, the evidence of this is to the contrary and in the Court's opinion does not rise to the level of a prima facie case, and that exception is the testimony of Mr.—I have been referring to him as Gordon one because it was the first Mr. Gordon to testify; I don't recall his first name without looking it up—but the evidence which is before the Court, first of all, is the collective bargaining agreement of '74 to '77, that each of these plaintiffs was a member of the union and that that union was its agent or her agent and representative for collective bargaining purposes, that the unions did collectively bargain for these individuals, and that the collective bargaining agreements which were arrived at after the ordinary and regular course of labor negotiations were facially neutral; that at least in early 1976, prior to the effect of the operable period here, other lady workers were successful in transferring jobs into lines of progression which were normally filled by men, and the—at least one witness testified as having received

what is in evidence as the Hudson Today article which in 1974—in which the company advertised in 1974 for ladies to apply for what were traditionally mens jobs.

Now, considering all of this evidence and all of the evidence which the Court has not discussed here, the Court finds that the plaintiffs have failed to establish a legally mandatory rebuttable presumption giving rise to a prima facie case, and therefore the motions should be granted.

In addition, and alternatively, the Court finds that the requirements of Title 7 insofar as the filing of complaints with the EEOC have not been met, in that they were not under oath and it's the opinion of the Court that there was a state agency which was authorized to grant or seek relief, and they were not filed with that state agency prior to the filing with EEOC. And for those technical reasons, the motion should also be granted.

Accordingly, the Court will grant the motions—well, before I do that, with respect to the unions in this case, the Court finds that there is absolutely no evidence whatsoever to hold the unions liable for any discriminatory practices in this case, and without a discussion of the evidence the motions should be granted as to the unions. Accordingly, the Court will grant the motions for judgment of dismissal pursuant to Rule 41 (b) of the Federal Rules of Civil Procedure and direct the clerk to enter judgment accordingly.

* * * *

Supreme Court, U.S.
FILED
OCT 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MELBA J. TAYLOR, *et al.*,
Petitioners,

v.

HUDSON PULP AND PAPER CORP., *et al.*,
Respondents.

On a Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT HUDSON PULP & PAPER CORP.'S BRIEF IN OPPOSITION

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Date: October 22, 1987

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Should the Supreme Court grant review of a decision in which the court of appeals applied the appropriate standard of review to the district court's decision dismissing plaintiff's Title VII cause of action for failure to establish a *prima facie* case and where petitioners never asserted before the court of appeals that there might be a conflict with regard to the proper standard of review to be applied?

2. Should the Supreme Court grant review of a court of appeals decision where the appellate court engaged in a full review of the record and upheld the district court's findings and where the petitioners never requested the district court to supplement its findings or argued to the appellate court that the findings below were inadequate?*

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* Corporate affiliations are noted at p. ii of Petitioners' Brief.

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IN THE

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No. 87-486

MELBA J. TAYLOR, *et al.*,
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Respondents.

On a Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

RESPONDENT HUDSON PULP & PAPER CORP.'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Statement of the Facts

This petition involves a Title VII sex discrimination case brought by six employees of Respondent Hudson Pulp & Paper Corp. ("Hudson" or "company") alleging discrimination during the actionable period of April 3, 1976 to September 30, 1976. 42 U.S.C. § 2000e-5(c) (1982). (App. 41a.)[1] It has its genesis in the 1970 clos-

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[1] "App." refers to the Appendix attached to the petition for certiorari. "Tr." refers to the trial transcript.

ing of Hudson's Multiwall Department, in which each plaintiff was then working. (App. 40a.) Petitioners complained in their EEOC charges that after the Multiwall closing and their subsequent transfer to the Bag Department, they were frequently laid off instead of other women who had greater Bag Department seniority but less mill seniority. Petitioners also alleged in their EEOC charges that they were allowed to transfer in 1970 only to a traditionally female job in the Bag or Tissue Department.[2]

Whatever occurred in earlier years, by 1974 the company was fully engaged in affirmative efforts to assist female employees in obtaining jobs throughout the mill, including those jobs which had traditionally been filled by males.[3] In January 1974 the Company newspaper for employees contained a feature article entitled "Hey Lady, Wanna Be a Welder?" which in very strong terms encouraged women to seek transfer to traditionally male jobs. (App. 8a.)[4]

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[2] Five Petitioners also complained in their EEOC charges that there were unspecified jobs in the pulp mill that they could perform but that they could not take such jobs without losing their departmental seniority and risking unacceptable layoffs. Five plaintiffs also asserted that they were discouraged from moving up the line of progression to machine operator and above in the Bag Department because they first had to work as a chute loader which required lifting of bales that were too heavy for them. None of the EEOC charges alleged that the company failed to automatically promote them within the Bag Department.

[3] The District Court found that any discriminatory practices which might have allegedly occurred prior to 1974 were cured by subsequent acts of the company and that any practices which might have existed in 1976 were present effects of past discrimination, which are not actionable. (App. 41a.) This ruling is not challenged by Petitioners.

[4] The article stated in pertinent part:

> [W]hat about discrimination because of sex? If a woman wants to be a welder, or wants to work on the Kraft Paper

Shortly after the "Hey Lady" article appeared in 1974, women who were known to plaintiffs, including Petitioner Knowles' stepdaughter, began requesting transfers to and receiving jobs traditionally held by men. Thus, by April 1976 there were women in traditionally male jobs in the Laboratory, Storeroom and Wood Receiving Departments.[5]

The Company also took steps to encourage women to move to traditionally male jobs within the Bag Department. Prior to the 1974 labor agreement there were two lines of progression within the Bag Department, the "bag catcher" line and the "baler" line. While nothing in the

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> Machines or wants to try the tow-motor and load boxcars in one of the Shipping Departments, can she do it? Absolutely! All she has to do is put in a transfer . . . After all, women proved they could weld during World War II right here close at home at the shipyards in Jacksonville. Similarly, if a woman is capable and willing to start out on the broke meters she then has the opportunity to work towards becoming a machine tender. If she is willing to work in the lime kilns she can then be on the road to becoming a digester cook. This is the same route that the men take.
>
> So what about it ladies? You know a gal doesn't have to be a bra-burning women's libber in order to want to do something besides catch bags or napkins all day or pound a typewriter for eight hours. She just might be able to load that box car as good as any man; after all, the tow-motor does most of the work. And if this is what she wants and if she can do the job, why shouldn't she be given the opportunity?

[5] In May 1974, Phyllis Smith, who had been in Multiwall with Petitioners, transferred to the Laboratory as a kraft pulp tester. In October 1974, Arta Mae Choate transferred from the Bag Department, where plaintiffs were then working, to the Storeroom as a store issues clerk. On August 25, 1975, Virginia Sheppard also transferred to store issues clerk. On April 19, 1976, Mary May transferred to the Laboratory as a kraft pulp tester. On April 12, 1976 Diane Suckow, plaintiff Knowles' stepdaughter, transferred to the Wood Receiving Department as a woodchecker. (App. 9a n.3.)

contract prevented women from moving from the bag catcher line to the baler line, some women, including petitioners in their EEOC charges (*see* n.2, *supra*), complained that the baler line entry level position of chute loader was too difficult for some females. Effective June 1, 1974, the two lines of progression were merged above the chute loader job so that bag catchers could switch over to the baler line of progression and bypass the "demanding" chute loader job. (App. 4a.)

In 1975 and early 1976 Hudson and the unions negotiated two major bargaining agreements.[6] The Amended Seniority Agreement ("ASA"), which applied generally to all employees, abolished departmental seniority, rearranged lines of progression, and established a transfer system whereby vacancies were posted and bid for at the time they occurred. (App. 4a.) It was the use of departmental seniority as opposed to mill seniority which Petitioners claimed in their EEOC charges was holding them back.[7]

The Special Seniority Procedures ("SSP") gave to female and black employees (known as "designates") who were hired prior to the effective date of Title VII, such as Petitioners, the right to: (1) "pre-bid" before other

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[6] The Amended Seniority Agreement was tentatively agreed to on January 23, 1976. (App. 4a.) The Special Seniority Procedures was tentatively agreed to on March 25, 1976, revisions were made on April 22, 1976, and both agreements were signed on July 20, 1976. (*Id.*)

[7] Petitioners admitted that the use of departmental seniority effected men and women equally. In any event, the inability to use the type of seniority which is most beneficial to you personally is not discrimination. *See International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 370 n.56 (1977) ("Those nonapplicants who did not apply for transfer because they were unwilling to give up their previously acquired seniority suffered only from a lawful deterrent imposed on all employees regardless of race of ethnicity.").

employees for entry-level jobs in any department in the plant; (2) use their mill seniority in all employment matters, including promotion, layoff and recall for layoff; and (3) use special "red-circle" wage protection which guaranteed they would receive their old rates of pay if they transferred to a job which paid less. (App. 4a-5a.)

Petitioners concede that none of them submitted a single transfer request between 1970, when they all transferred to the Bag Department, until September 1976, when they submitted transfer requests under the preferential terms of the ASA and SSP outlined above. With the exception of Petitioners Burroughs and Carter, who withdrew their requests and retired, each Petitioner prebid for and was awarded the *first* job which became available to which her mill seniority entitled her. (Tr. I 56, II 221, 241-43, 246-47, III 27-28, 121-22.) Petitioners bid for and received the jobs of lime kiln helper, tall oil operator, kraft pulp tester, store issues clerk and wood checker—the very jobs to which women had transferred prior to and during the actionable period under the old transfer request system. (*See* n.5, *supra.*)

B. Procedural History

The trial was held over four days in July 1984 before the Honorable John H. Moore II in Jacksonville, Florida. After plaintiffs rested their case, defendants moved for involuntary dismissal pursuant to Fed. R. Civ. P. 41(b). After retiring to chambers for approximately four hours to consider the evidence, Judge Moore granted defendants' Rule 41(b) motion, announcing his findings from the bench. (*See* App. 39a-43a.)

The District Court found that plaintiffs had failed to make out a *prima facie* case of discrimination as required under this Court's decisions in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). (App. 39a-43a.) Plaintiffs never moved the District Court to make more detailed findings of fact or conclusions of law. The District Court also dismissed the action, alternatively, based on plaintiffs' failure to satisfy EEOC administrative requirements. The Court found that plaintiffs had failed to both sign their EEOC charges under oath and to file those charges with the appropriate state agency prior to filing with the EEOC. (App. 43a.)

Plaintiffs appealed, asserting that the District Court erred in finding that plaintiffs had failed to make out a *prima facie* case. Plaintiffs also asserted that the District Court erred in ruling that plaintiffs failed to comply with EEOC administrative requirements. In its briefs to the Court of Appeals, plaintiffs mentioned nothing about any conflict with regard to the proper standard of review to be applied to a Rule 41(b) dismissal of a Title VII discrimination case.

On May 19, 1986 the Court of Appeals for the Eleventh Circuit affirmed the District Court's decision holding that plaintiffs had failed to establish a *prima facie* case. (App. 1a-34a.) Because the Court of Appeals agreed that plaintiffs had failed to carry their evidentiary burden, they found it unnecessary to address plaintiffs' appeal of the District Court's alternative grounds for dismissal; failure to satisfy EEOC administrative requirements.

Plaintiffs submitted a Petition for Rehearing and Suggestion for Rehearing *En Banc*, raising for the first time the assertion that the standard of review of a Rule 41(b) dismissal of a Title VII action was unclear. Despite plaintiffs' contention that there was a conflict *within* the Eleventh Circuit with regard to the proper standard of review, no member of the original panel or any active Judge of the Eleventh Circuit voted for *en banc* consideration. (App. 37a-38a.)

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT BETWEEN THE VARIOUS COURTS OF APPEALS REGARDING THE STANDARD OF REVIEW OF A RULE 41(b) DISMISSAL OF A TITLE VII ACTION FOR FAILURE TO ESTABLISH A *PRIMA FACIE* CASE

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court set down a three part order of proof to be applied in Title VII discrimination cases. The plaintiff must first make out a *prima facie* case of discrimination. If such a case is established, the defendant has an opportunity to show that the employment action at issue was taken for valid, nondiscriminatory reasons. The plaintiff may then attempt to show that the employer's "valid" reasons are pretextual. This system was established, in part, in recognition of the fact that it would often be very difficult for plaintiffs to put forward direct evidence of discrimination. *See United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983).

It is certainly not difficult to establish a *prima facie* case of discrimination:

> The burden of establishing a *prima facie* case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). *See also McDonnell Douglas*, 411 U.S. at 802.

In this case the District Court found that Petitioners failed to esablish a *prima facie* case since they failed to establish that they applied for any particular jobs within the actionable period or that there were any vacancies during that period:

> It's the Court's opinion that this is the precise type of case which cries out for the application of the *Burdine* case as well as the *McDonnell-Douglas* case, and that the failure of the plaintiffs to prove that they applied for a vacancy for which they were qualified and rejected and prove that there was in fact such a vacancy, operates to defeat their claims. Further, that there was no showing and no proof that the vacancy for which they would have applied, if there had been such a vacancy, was given to a person of the opposite gender. (App. 41a-42a.).

The Court of Appeals, analyzing the evidence presented, found that the District Court's findings that plaintiffs had failed to establish either a vacancy during the actionable period or that they had applied for a vacancy during that period, were not clearly erroneous. Since the plaintiffs had failed to establish the *McDonnell Douglas* criteria for a *prima facie* case, the Court of Appeals upheld the District Court's dismissal.

Petitioners now contend that the standard by which the Court of Appeals may review such a determination is unclear and should be addressed by this Court. Petitioners claim that while some courts apply a clearly erroneous standard to a finding of no *prima facie* case, other courts view such determination as wholly a matter of law, subject to plenary review.

A. Petitioners Have Waived Their Right to Seek Review of This Issue Before the Supreme Court

Except under exceptional circumstances, this Court will not address issues not raised before the Court of Appeals:

> Ordinarily, this Court does not decide questions not raised or resolved in the lower court. *California v. Taylor*, 353 U.S. 557 n.2 (1957); *Lawn v. United States*, 355 U.S. 339, 362-363 n.16 (1958) . . . . Its usual formulation is: "It is only in exceptional

> cases coming here from federal courts that questions not pressed or passed upon below are reviewed." *Duignan v. United States*, 274 U.S. 195, 200 (1927).

Youakim v. Miller, 425 U.S. 231, 234 (1976). *See also Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) ("Although defendant's petition for certiorari presented the question of the District Judge's abuse of discretion in denying defendants costs under Rule 54(d), that question was not raised in the Court of Appeals and is not properly before us."); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") Raising an issue for the first time in a suggestion for *en banc* review does not cure this defect. *See Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984):

> We also do not address Ronwin's contention that the Arizona method of limiting bar admissions violates the Fifth and Fourteenth Amendments. As Ronwin concedes, he made this argument for the first time in his response to petitioners' motion for rehearing in the Court of Appeals. His failure to raise this issue in a timely manner precludes our consideration.

Petitioners made no mention in their briefs to the Court of Appeals that the standard of review might be in question—even though they claim that the standard is in dispute *within* the Eleventh Circuit. Petitioners set out the "standard of review" in their appellate brief as follows:

> A district court's findings of fact may be set aside when they are clearly erroneous. Fed. R. Civ. P. 52 (a). In addition, "if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis." *Pullman-Standard v. Swint*, 456 U.S. 273, 287, 72 L.Ed. 2d 66, 79 (1982).

> Legal rulings are fully reviewable. *E.g., Horn v. C.L. Osborn Contracting Co.*, 591 F.2d 318, 320 (5th Cir. 1979). ("[T]his court is free to substitute its judgment on the law before it.")[8]

By not raising the alleged "conflict" before the Court of Appeals, petitioners attempted to have it both ways. That is, no matter which standard the court applied, petitioners could later argue that the standard is in dispute and the court should perhaps have applied the other standard. A party should simply not be permitted to state in its appellate brief in very straightforward terms what the standard is and then, upon receiving an adverse decision, contend that the standard is different or unclear. There is certainly nothing exceptional about this case which should cause this Court to abandon its general rule that matters not raised before the Court of Appeals will not be considered.

B. To the Extent Any Conflict Exists, it Is Intra, not Inter Circuit

As Petitioners themselves explain, any conflict—to the extent one exists—is between courts of the *same* circuits: "[I]n *Gay v. Waiters' and Dairy Lunchmen's Union*, 694 F.2d 531, 539-46 (9th Cir. 1982), one panel of the Ninth Circuit, per Judge Clifford Wallace, considered the issue at length, [and] criticized other Ninth Circuit decisions that applied the clearly erroneous standard. . . ."[9] (P. Br. p. 11.) In describing the alleged "conflict", Petitioners cite cases from the fifth, sixth, ninth, and eleventh circuits which have applied the clearly erroneous standard. (P. Br. p. 12.) They then cite cases from the very

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[8] (Petitioners' Appellate Br., p. 39.) Petitioners contended that the dismissal of their action as to the unions for failure to establish a *prima facie* case was "clearly erroneous". (*Id.* at p. 49.)

[9] *Gay* was an action under 42 U.S.C. § 1981 *et seq.* In discussing the standard of review, the court in *Gay* distinguished *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), on the basis that it was a Title VII action, not a § 1981 case. 694 F.2d at 545 n. 14.

same circuits purporting to hold that the question is subject to plenary review. (P. Br. p. 13.) Thus, even assuming that a conflict exists, it is certainly not ripe for Supreme Court review when the circuits themselves have not taken a final position on which standard to apply.

C. There Is No Conflict

There is no dispute that a court of appeals is to apply the "clearly erroneous" standard to a district court's ultimate determination of whether there exists an intent to discriminate. *See Pullman-Standard v. Swint*, 456 U.S. 273 (1982). *See also* P. Br. pp. 11-12. There is likewise no dispute that a court of appeals is to apply the "clearly erroneous" standard to the question of whether the plaintiff has established each element of the *McDonnell Douglas* test for a *prima facie* case: "Appellate review of any individual factual element of a *prima facie* case is made pursuant to the clearly erroneous standard." (P. Br. p. 10 n.6.) According to Petitioners, "[t]he disagreement in the courts of appeals relates to the overall conclusion as to whether the facts make out a *prima facie* case." (*Id.*)

Although petitioners claim that the same "conflict" which they now bring before this Court exists *within* the Eleventh Circuit, not one judge from that court voted for *en banc* review of this question. Moreover, Judge Clarke mentioned nothing about any conflict regarding the standard of review in his dissent. He instead focused on his disagreement with the panel's holding that the lower court's decision was not clearly erroneous.

In the context of establishing a *prima facie* case under Title VII, the Supreme Court has set out the law very clearly and succinctly; the plaintiff must establish that there was a vacancy for which she was qualified and that she actually applied for that vacancy and did not receive the job. If the Court of Appeals determines

that the District Court's findings as to whether the *McDonnell Douglas* criteria were satisfied are not clearly erroneous, it has no choice but to uphold the decision, unless the district court made a mistake in applying the criteria, *i.e.*, a mistake of law.

The cases cited by petitioners which supposedly hold that the ultimate finding of no *prima facie* case is subject to plenary review fall into essentially two categories. First, they are cases where because the court of appeals found the district court to have been clearly erroneous with regard to its findings of whether the plaintiffs established each of the *McDonnell Douglas* elements, they held as a "matter of law" that there was no *prima facie* case.[10] Of course, in this case the Court of Appeals found the District Court's findings on the *McDonnell Douglas* elements to have been correct.

Petitioners also cite several cases which, relying on a footnote in *McDonnell Douglas* that the criteria set out in that decision may vary from case to case, supposedly held that a *prima facie* case was established even though the criteria were not technically satisfied. Yet, there has never been a claim in this case that the *McDonnell Douglas* criteria should not be followed. Petitioners' briefs to the Court of Appeals claimed only that the District Court's findings as to those criteria were clearly erroneous, not that the criteria should not be applied.

There can be no doubt that the application of mixed questions of fact and law can be confusing. "The Court has previously noted the vexing nature of the distinction between questions of fact and questions of law." *Pullman-*

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[10] *See, e.g., Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370 (6th Cir. 1984), *cert. denied*, 106 S. Ct. 3298 (1986); *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181 (11th Cir. 1984.)

Standard v. Swint, 456 U.S. at 288. But the mere fact that several circuit court panels have used less than precise language in explaining the mix of fact and law is hardly reason to grant certiorari.[11]

Finally, even if the Court of Appeals was granted plenary review in this case, the result would be the same. As outlined above, Petitioners must establish that they actually applied for an available vacancy. Petitioners concede that they did not apply for a vacancy during the actionable period, asserting that it would have been fultile to do so. Granting the Court of Appeals plenary review surely would not alter that Court's view that "the evidence is overwhelming that an application for transfer would not have been futile. . . ." (App. 13a.) Under any standard of review, a plaintiff who fails to establish that they applied for a vacancy (or that it would have been futile to do so) has failed to establish a *prima facie* case.

II. THE COURT OF APPEALS CORRECTLY UPHELD THE FINDINGS OF THE DISTRICT COURT AND DID NOT CREATE ITS OWN FACTUAL FINDINGS

Petitioners contend that this Court should grant certiorari because the District Court failed to make findings on their claims (1) that it would have been futile to apply for a transfer outside of the Bag Department and (2) that they were denied promotions within the Bag Department. (P. Br. pp. 16-17.) Petitioners contend that the Court of Appeals instead improperly filled in these factual findings.

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[11] A close examination of these cases reveals that they all apply essentially the same standard; "clearly erroneous" to the factual findings and *de novo* review to the issues of law. This is the same standard set out by Petitioners in their brief to the Court of Appeals.

A. Petitioners Have Waived Their Right To Object to a Lack of Adequate Findings By the District Court

Petitioners' argument in Section II of its petition is not that the District Court's findings were incorrect but that they were inadequate; that they did not reach all the issues. Yet, as with their first issue, Petitioners did not raise this contention until they petitioned for *en banc* review to the full Eleventh Circuit. A party may not seek appeal—and may certainly not obtain certiorari—based on a lack of findings by the district court when that party never requested that court to supplement or amend its findings. *See, e.g., Evans v. Suntreat Growers & Shippers, Inc.*, 531 F. 2d 568, 570 (Temp. Emer. Ct. App. 1976) (per curiam); *McMahon v. Caribbean Mills, Inc.*, 332 F. 2d 641, 643 (10th Cir. 1964).

Petitioners' claim in Part II of its petition is the same argument raised by virtually ever unsuccessful litigant in a bench trial where the court announces its findings from the bench. Every such litigant will be able to find certain issues or claims where the court's findings are less particularized than they otherwise might be if all parties had submitted prepared findings of fact and conclusions of law at the close of trial—a procedure which is quite awkward if not inappropriate where the court dismisses the action at the close of plaintiffs' evidence pursuant to a Rule 41(b) motion. Here, where Petitioners neither requested the District Court to amend or supplement its findings *nor* argued to the Court of Appeals that the District Court's findings were in some way inadequate, certiorari is wholly inappropriate.

B. The Court of Appeals Did Not Create Its Own Findings

The idea that the District Court did not make any findings as to the "petitioners' justifiable belief about the supposed futility of applying for transfers" is quite amazing. The District Court specifically found:

> Now, the plaintiffs would argue that it was futile to apply for a position because of the pattern and practice of the defendants in continuing to confine positions in the traditionally male lines of progression to men and the traditionally female lines of progression to females. With one exception, the evidence of this is to the contrary and in the Court's opinion does not rise to the level of a prima facie case, and that exception is the testimony of Mr. [Gordon] . . . but the evidence which is before the Court, first of all, is the collective bargaining agreement of '74 to '77; . . . that the collective bargaining agreements which were arrived at after the ordinary and regular course of labor negotiations were facially neutral; that at least in early 1976, prior to the effect of the operable period here, other lady workers were successful in transferring jobs into lines of progression which were normally filled by men, and the—at least one witness testified as having received what is in evidence as the Hudson Today article in 1974—in which the company advertised in 1974 for ladies to apply for what were traditionally men's jobs.
>
> Now, considering all of this evidence and all of the evidence which the Court has not discussed here, the Court finds that the plaintiffs have failed to establish a legally mandatory rebuttable presumption, giving rise to a prima facie case, and therefore the motions should be granted.

(App. 42a-43a.)

The Court of Appeals, reviewing the evidence to determine if the District Court's finding was clearly erroneous, held:

> [T]he evidence presented in this case fully authorized *the district judge to find* that no such futility existed here. Indeed, the *evidence is overwhelming* that an application for transfer would not have been futile; such applications for transfer were actively solicited by the appellees and, when received, were granted.

(App. 13a, emphasis added.)

Petitioners apparently contend that because they themselves testified that they personally believed it would have been futile to apply for a transfer, they have proved a *prima facie* case in spite of the evidence. (P. Br. pp. 16-17.) *McDonnell Douglas* and *Burdine* make clear that a plaintiff must establish a *prima facie* case by a *preponderance* of the evidence. 411 U.S. at 252-253. As the above-quoted portion of the District Judge's opinion establishes, the court considered "all of this evidence and all of the evidence which the Court has not discussed here," in concluding that it would not have been futile to apply for transfers. The fact that the District Court Judge did not state specifically in his findings that he did not find the statements of the plaintiffs to be credible is irrelevant.

Plaintiffs' claim with regard to being denied intradepartmental promotion to the baler position was an afterthought which received virtually no attention at trial.[12] The failure to receive automatic promotions within the Bag Department was not a claim raised in petitioners' EEOC charges. (*See* p. 2, *supra.*) Moreover, no witness testified at trial regarding vacancies in the baler position during the actionable period. Likewise, Petitioners' counsel made no mention of any baler vacancies during the actionable period in his closing arguments against Respondents' Rule 41(b) motion. *See* Tr. IV.[13]

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[12] Plaintiffs' lack of serious interest in the baler job was demonstrated by the fact they had not even noticed by September 30, 1976, when they filed their EEOC charges, that the labor agreement had been modified in 1974 to give them the right to bypass the heavy chute loader job and go directly to baler. (*See* pp. 3-4, *supra.*)

[13] Petitioners introduced into evidence certain seniority lists which they argued to the Court of Appeals purported to show vacancies in the baler position. No person testified to this effect at trial. The first time Petitioners raised this issue in earnest was before the Court of Appeals. It is therefore no wonder that Petitioners now contend that it was the Court of Appeals which ruled on this issue in the first instance.

It is perhaps for this reason that the District Court's findings on this issue were not as detailed as some others. That is not to say, however, that the Court made no findings on this issue. Evidence was presented that regardless of whether petitioners had to apply for a new position within their own department, there were no vacancies within that department during the actionable period. The District Court determined:

> The Court finds that no plaintiff requested a transfer, either intra- or interdepartment, and that the plaintiffs failed to prove that they had so requested such a transfer, that there was a vacancy between April 3 and September 30 of 1976 . . . .[14]

(App. 41a. *See also* finding set out at p. 10, *supra.*)

The Court of Appeals found that the District Court did in fact make an actual finding on the vacancy question. The Court determined that "taking the evidence regarding this issue on the whole, *the district court's finding* on this issue was not clearly erroneous." (App. 11a, emphasis added.) Reviewing this finding the Court of Appeals found that "*substantial evidence* exists that within the department no vacancy occurred for which any appellants were the most qualified." (App. 11a, emphasis added.) The question of vacancies in the baler position during the actionable period was simply a disputed question which the District Court actually ruled upon—against Petitioners.

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[14] Even though Petitioners offered no testimony relating to vacancies in the baler position, the District Court still made a finding on this question because it is part of the *McDonnell Douglas* analysis applied by the Court.

CONCLUSION

For the reasons stated above, and because the District Court dismissed Petitioners' action on the alternative grounds that Petitioners failed to satisfy EEOC administrative requirements, the petition for certiorari should be denied.

Respectfully submitted,

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No. 87-486

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IN THE

Supreme Court of the United States

October Term, 1987

MELBA J. TAYLOR, et al.,
Petitioners,

v.

HUDSON PULP AND PAPER CORP., et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENTS UNITED PAPERWORKERS INTERNATIONAL UNION (UPIU), UPIU LOCAL UNION 641, UPIU LOCAL UNION 1565, UPIU LOCAL UNION 1717, UPIU LOCAL UNION 598, AND UPIU LOCAL UNION 852 IN OPPOSITION

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Statement of the Case

The statement of the case in the petition for certiorari omits pertinent facts.

The female petitioners complained of employment gender discrimination by their employer, respondent Hudson Pulp and Paper Corp., and the respondent unions, United

Paperworkers International Union and its Locals 641, 1565, 1717, 598 and 852 in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e), *et seq.* The local unions represent different employees in the workplace in which the petitioners were employed. All the petitioners were employed on jobs over which exclusive representation was exercised by Local 641 only. Petitioners charges with the Equal Employment Opportunity Commission named only their employer and Local 641. *42 U.S.C. 2000-5(b).*

At the trial, petitioners failed to adduce any evidence of discrimination by the unions during the actionable period. Their proof was limited to claims that they were aggrieved by the action of their employer in failing to transfer and promote them because of their sex. The petitioners' statement of the case addresses itself exclusively to alleged misconduct of their employer—making no claim that any of the unions were responsible for any of the alleged discrimimination.

The district court granted the unions' motion to dismiss the action against them pursuant to Rule 41(b) of the Federal Rules of Civil Procedure on the ground that the petitioners failed to establish a *prima facie* case at the conclusion of the petitioners' case-in-chief.

In its ruling the district court, after reviewing the evidence adduced against the employer, held that:

> "... the Court finds that there is absolutely no evidence whatsoever to hold the unions liable for any discriminatory practices in this case, and without a discussion of the evidence the motions should be granted as to the unions." (App. 43a)

The court of appeals affirmed by majority vote. Although both the majority and dissenting opinions discussed the evidence as to employer discrimination at length, neither opinion questioned or commented upon the district court's findings of fact and conclusions of law, as orally stated in open court, that there was "absolutely no evidence whatsoever to hold the unions liable". (App. 1a-38a)

Summary of the Argument

A petition for rehearing and suggestion for hearing *en banc* of the decision of the court of appeals was denied for the reason that no member of the panel nor Judge in regular active service requested that the Court be polled on rehearing *en banc*. (App. p. 37a-38a)

The petitioners now seek review of this decision on the same grounds urged in their petition for reconsideration, to wit:

(1) a conflict exists among the courts of appeals on whether the clearly erroneous standard of Fed. Rules of Civ. Proc. 52(a) is applicable to a determination of a *prima facie* case of employment discrimination;

(2) the court of appeals improperly made fact findings in reaching its decision of affirmance.[1]

1. Concurrent findings of two courts below are final on review by the Supreme Court in the absence of a very exceptional showing of error. *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214 (1948). This is especially valid where not a single judge in the Eleventh Circuit voted to consider the issues raised in seeking reconsideration—the same issues presented by the instant petition to this Court.

There is, in point of fact, no conflict among the courts of appeals on the application of the clearly erroneous standard in employment discrimination cases. Moreover, this Court has resolved the procedural question raised in several of its decisions.

As to the second question presented, the court of appeals did not make new findings of fact essential to sustain its decision of affirmance. It merely referred to some of the evidence in considering petitioners' factual contentions and in concluding that the trial court's findings were not clearly erroneous. Indeed, it made no reference whatever to the facts applicable to the unions' responsibility—since there were no such facts.

In all events, the unions cannot plainly be found responsible for employment discrimination under any legal principles where no evidence of any acts of improper conduct on their part was adduced at the trial.

Finally, any procedural error that may be found to have occurred would constitute harmless error pursuant to 28 U.S.C. Sec. 2111 in the case of the unions.[2] None of the substantial rights of the petitioners were adversely affected by the dismissal of their cause of action against the unions in the absence of any evidence against them.

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2. 28 U.S.C. Sec. 2111:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

ARGUMENT

I. It is well settled that the clearly erroneous standard is applicable to the review of a *prima facie* case determination.

Petitioners rely heavily on the opinion of Judge Wallace in the case of *Gay* v. *Waiters' and Dairy Lunchmen's Union*, 694 F.2d 531, 545 (9th Cir. 1982) in which he acknowledges but dissents from the preponderance of appellate decisions holding that the clearly erroneous standard is applicable to the review of *prima facie* case determinations. To reach his conception, Judge Wallace was compelled to distinguish the holdings in *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982). In that disparate impact case, this Court held that a district court's findings of discrimination in a Title VII action is a factual finding that may be overturned on appeal only if it is clearly erroneous as provided in Fed. Rules of Civ. Proc. 52(a).

The Ninth Circuit decision noted, as the petition points out at pp. 11-12, that the *Swint* case, *id.* involved a disparate impact case rather than a disparate treatment case under Title VII. The case on review before the court of appeals was a disparate treatment case. It reasoned that the Supreme Court's holding in *Swint*, *id.* that the clearly erroneous standard should be applied on appeal was not applicable to a disparate treatment case. 694 F.2d at 545, n.14 [3]

3. Under the disparate treatment theory, a complainant must prove that he or she was treated less favorably than others because of his or her race, color, religion, sex or national origin. Discriminatory intent is a necessary element of proof in disparate treatment cases. Discriminatory motive need not be proved in a case involving

(footnote continued on next page)

The underpinnings of Judge Wallace's opinion were removed by the subsequent decision of this Court in the case of *Anderson* v. *City of Bessemer*, 470 U.S. 564 (1985), a disparate treatment case.

In *Anderson*, supra, the U.S. Supreme Court made it crystal clear that:

> ". . . the standard governing appellate review of a district court's finding of discrimination is that set forth in Federal Rule of Civil Procedure 52(a): 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses.' The question before us, then, is whether the Court of Appeals erred in holding the District Court's finding of discrimination to be clearly erroneous'." *Id* at 573

Not finding that the trial judge's findings of discrimination (disparate treatment) was clearly erroneous, the Supreme Court reversed the judgment of the court of appeals which refused to accept the district court's findings. Thus, no doubt remains as to the application of the clearly erroneous rule in discrimination cases.

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disparate impact. "It is well established under Title VII that claims of employment discrimination because of race may arise in two different ways. *Teamsters* v. *United States*, 431 U.S. 324, 335-336 n.15 (1977). An individual may allege that he has been subjected to 'disparate treatment' because of his race, or that he has been the victim of a facially neutral practice having a 'disparate impact' on his racial group." *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 581-588 (1978) Marshall, J., concurring in part

II. There is no merit to petitioners' contention that a conflict exists as to the application of the clearly erroneous standard to employment discrimination cases.

A district court may arrive at findings of fact which are not clearly erroneous yet apply erroneous principles of law. An appellate court can review the law applied and determine whether a *prima facie* case of discrimination was established under applicable law.

In discussing whether the proper legal conclusions were reached by a trial court, expressions such as "matter of law" "legal conclusions", etc. may creep into the opinion. It does not follow from this that the reviewing court did not apply the clearly erroneous standard to the finding of fact in the case.

The cases cited by the petitioners, (some of which ante dated *Anderson, supra,*) do not support their basic contention that there is a division among the circuits on the application of the clearly erroneous rule.[4] To the contrary, these cases acknowledge the authority of the erroneous standard of review where applicable. Consequently, the petitioners have failed to establish a divergence of opinion by the appeal courts on the question.

In *Carmichael* v. *Birmingham Saw Works*, 738 F.2d 1126, 1130 (11th Cir. 1984), the court acknowledged the appropriate standard of review in the following words:

> "This Court may reverse a district court's finding of no intentional discrimination only if that finding is

4. Petition, p. 13, n.8

> clearly erroneous, or is based on clearly erroneous subsidiary findings of fact or on a mistaken view of the law. *Pullman-Standard* v. *Swint*, 1982, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66".

The quotation from this decision by the petitioners refers to a question other than the one in this case.

In *Jackson* v. *RKO Bottlers of Toledo*, 743 F.2d 370, 377 (6th Cir. 1984), cert. denied, 106 S.Ct. 3298 (1986), the appellate court reversed because the trial court applied the wrong legal principles to the facts in the case.

In *Nix* v. *WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1187 (11th Cir. 1984), the appellate court in laying out the perimeters of its review in that case stated:

> "Intentional discrimination is an issue of fact. *Pullman-Standard* v. *Swint*, 1982, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66. '[T]his Court may reverse a finding of intentional discrimination only if the finding is clearly erroneous.' *Lincoln* v. *Board of Regents*, 11 Cir. 1983, 697 F.2d 928, 940, cert. denied 1983, —— U.S. —— 104 S.Ct. 97, 78 L.Ed. 2d 102."

In *Zuniga* v. *Kleberg County Hospital*, 692 F.2d 986 (5th Cir. 1982), the issue in the case was whether termination of a pregnant x-ray technician hindered women's employment opportunities in violation of the statute, a purely legal question.

In *Moore* v. *Hughes Helicopters, Inc.*, 708 F.2d 475, 480 (9th Cir. 1983), the appellate court set forth as its recognized standard of review of the decision in that case:

> "The findings of fact made by a trial court following the granting of a Rule 41(b) motion for involuntary

dismissal will not be set aside unless clearly erroneous. *Sime* v. *Trustees of the California State University and Colleges*, 526 F.2d 1112, 1113 (9th Cir. 1975)"

In *Lynch* v. *Freeman*, 817 F.2d 380 (6th Cir. 1987), the district court dismissed the employment discrimination case because the acknowledged uneven burden on women was not substantial and there was no evidence of intentional disparate treatment. The court of appeals determined that the case also involved disparate impact which required no proof of intent. It accordingly reversed the ruling which had been based on a mistaken view of the applicable law. The issue of standard of proof was not involved.

Petitioners have failed to demonstrate a serious and substantial conflict among the appellate courts. The cases cited by petitioners do not stand for rejection of the clearly erroneous rule and hence do not establish the claimed conflict among the circuits.

In all events, the paramount rulings of this Court in *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982), and *Anderson* v. *City of Bessemer*, 470 U.S. 564 (1985), put to rest any claims that this Court should address and resolve the issue of review standards in discrimination cases. It has already done so.

III. The court of appeals made no *de novo* findings of fact essential to affirm the judgment.

As the majority opinion of the court of appeals noted, the district court found that the petitioners had failed to demonstrate that it met the necessary four criteria for establishing a *prima facie* discrimination case.

McDonnell Douglas Corp. v. *Green,* 411 U.S. 792, 802 (1973); *Perryman* v. *Johnson Products Co., Inc.,* 698 F.2d 1138, 1141 (11th Cir. 1983); (App. 6a)

This case was resolved on the basis of the absence of evidence upon which findings of liability could be made, causing the non-suit. The subsequent discussion in the majority opinion of the court of appeals simply explained why the decision of the trial court due to the lack of evidence was not clearly erroneous and why petitioners factual arguments lacked merit.

Moreover, there was no discussion or even reference to any findings involving the unions in either the majority or the minority opinions of the court of appeals. The negative finding of the trial court "that there is absolutely no evidence whatsoever to hold the unions liable for discriminatory practices" was not questioned by the appellate court in either the majority or minority opinions. There were no new or additional findings of any nature involving the unions made by the court of appeals.

Consequently, it cannot be argued that the court of appeals' alleged findings filled a critical gap in the facts to sustain the district court's dismissal of the petitioners' case against the unions. There can be a gap in a trial court's findings when upholding the establishment of a *prima facie* case which a court of appeals may not supply. This is not a case where an essential element to a cause of action may have been omitted at the trial level and then added by the appellate court. Here there is an absolute absence of any proof to sustain findings of a *prima facie* case of employment discrimination against the unions, findings and conclusions which the appellate court did not question.

IV. Where no evidence whatever is adduced against a party at trial, judgment of dismissal can be affirmed on the facts or the law or both.

One need not engage in a hair-splitting exercise as to whether an appeals court should review a ruling of failure to establish a *prima facie* case under the erroneous standard or the plenary review standard where as in this case the same result would be reached because of "absolutely no evidence whatsoever" against the unions.

As Judge Wallace pointed out in the *Gay* v. *Waiter's and Dairy Lunchmen's Union*, 694 F.2d 531, 545, 546 (9th Cir. 1982) case:

> "If we freely review the district judge's conclusion that no *prima facie* case has been demonstrated and conclude that he was correct, we would, obviously, come to the same conclusion if we followed the same restrictive clearly erroneous standard of review."

Again, in the case of *Spaulding* v. *University of Washington*, 740 F.2d 686, 699 (9th Cir. 1984), cert. denied 469 U.S. 1036 (1984), Judge Wallace made the same point:

> "Our past cases have not been consistent on whether our review of the lower court's ultimate finding regarding establishment of a prima facie case is de novo or under a clearly erroneous standard (citing cases). We need not decide which standard is correct because in this case . . . we reach the same conclusion under either one."

It is evident that a trial court has no alternative to a dismissal of a cause of action when no evidence to establish

that cause of action has been presented at trial. A reviewing court can do no less than uphold such a dismissal since there is no evidence to evaluate and no law to apply.

Although the petitioners' claims and arguments are confined to the employer, they have never discontinued against the unions, forcing the unions to continue to defend. The petitioners' persistence in continuing to pursue claims against the unions in this Court is unwarranted and baseless.

V. Procedural errors, if any, constitute harmless error in the case of the dismissal for lack of evidence to constitute a *prima facie* case.

Assuming, *arguendo*, that procedual errors were committed in the proceedings below, there can be no findings of liability nor should a party be compelled to put in a defense where, as in this case, there is absolutely no evidence whatsoever of any improper acts of discrimination by the unions. Judgment favoring the unions must remain as the outcome of any remand, even if the standards of review urged by the petitioners were applied or the court of appeals avoided the factual discussion objected to by the petitioners.

Since the results would be the same, any error would constitute harmless error raising no substantial questions for the consideration of this Court. *28 U.S.C. 2111.*

Conclusion

For the reasons above set forth, it is respectfully submitted that the petition for certiorari herein is wholly without merit and should be denied.

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No. 87-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MELBA J. TAYLOR, *et al.*,
Petitioners,
v.
HUDSON PULP AND PAPER CORP., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

It is important that issues relating to standards of review be settled, because the outcome of any close case may depend upon which standard the appellate court applies. As the petition shows, that goal is undermined in employment discrimination cases, because the courts of appeals are in disarray over whether to apply the clearly erroneous standard or the plenary review standard when considering the sufficiency of a *prima facie* case under Title VII. (Pet. for Cert. 10-13.) Moreover, as the petition also shows, the Eleventh Circuit, by engaging in widespread fact-finding, consciously ignored the decisions of this Court admonishing courts of appeals to respect the division of functions between appellate courts and trial courts. (*Id.* at 15-17.) The respondents' oppositions do not bridge the conflict among the circuits or justify the court of appeals' role as finder of the facts in this case.

I. The Standard of Review for *Prima Facie* Cases of Employment Discrimination

A. *The Conflict.* As matters now stand, five circuits are in conflict over the standard of review. (Pet. for Cert. 10-13.) Respondent Hudson Pulp and Paper ("Hudson") asserts, however, that "there is no conflict" over the standard of review. (Hudson's Opp. 11.) Nowhere does the company confront the holding in *Gay* v. *Waiters' and Dairy Lunchmen's Union*, 694 F.2d 531 (9th Cir. 1982), that a district court's determination as to the sufficiency of a *prima facie* case is a question of law subject to plenary review, or the cases that have followed *Gay* on this point. Nor does the company endeavor to explain why the cases that apply a clearly erroneous standard, including the one at bar, do not contradict Gay. To attribute the conflict, as Hudson does, to "the mere fact that several circuit court panels have used less than precise language," (Hudson's Opp. 13) simply ignores Judge Wallace's detailed analysis of the issue in *Gay* and the holdings by panels in five courts of appeals.[1]

The United Paperworkers International Union and its Locals ("the unions") argue that the conflict has been resolved by *Anderson* v. *City of Bessemer*, 470 U.S. 564 (1985), because that case demonstrates that "the clearly erroneous rule [applies] in discrimination cases." (Unions' Opp. 6.) We agree that the clearly erroneous standard applies to issues of fact in discrimination cases. But *Anderson* did not decide what standard should be used to review the sufficiency of a *prima facie* case of discrimination. Indeed, after this Court decided *Anderson*, the courts of appeals have continued to apply the plenary

[1] Hudson erroneously states that *Gay* is a case arising under 42 U.S.C. § 1981, and that *Gay* distinguishes *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982), on the basis that *Swint* is a Title VII case. (Hudson's Opp. 10, n.9.) In fact, *Gay* was a disparate treatment case brought under Title VII and § 1981; and *Gay* distinguished *Swint* on the basis that the issue in that case was whether plaintiffs had proved intent to discriminate, not whether they had established a *prima facie* case. 694 F.2d at 545, n.14.

review standard, thus undermining the notion that *Anderson* resolved the conflict. See cases cited in Petition for Certiorari at 13-14, nn. 8-9.[2]

Finally, Hudson argues that resolution of the conflict, if any, will not affect the outcome of this case because whatever standard applies in this case, the result will be the same—affirmance of the district court. (Hudson's Opp. 13.) That prediction is unduly optimistic. The affirmance in this case rested on appellate fact-finding and application of a standard of review that is overly generous to the district court. Even with the aid of these impermissible standards and procedures, the panel's disposition of this case evoked a strong dissent. If the proper standards and procedures were followed, reversal should result. The record in this case is clear that even under the panel's version of the facts, there is no explanation justifying Hudson's refusal to assign females to at least two of the 17 baler positions.[3]

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[2] Petitioners cited a number of cases that applied a plenary review standard to consider the sufficiency of the *prima facie* case of employment discrimination (Pet. for Cert. 11, 13-14). The unions quote from other portions of these cases to show that the clearly erroneous standard was used to review individual questions of fact. (Unions' Opp. 7-8.) That simply shows that the individual elements of a *prima facie* case may involve issues of fact. The overall conclusion as to whether the facts make out a *prima facie* case is, however, an issue of law. (Pet. for Cert. 10, n.6.)

[3] Hudson also argues that "even assuming that a conflict exists, it is certainly not ripe for Supreme Court review when the Circuits themselves [*i.e.*, the Fifth, Sixth, Ninth, and Eleventh Circuits] have not taken a final position on which standard to apply." (Hudson's Opp. 11.) Hudson's approach would postpone resolution of this issue until at least one or more circuits have held rehearings *en banc* and aligned their conflicting cases. The need for uniformity and resolution of conflicts among the circuits, however, is not diminished by the fact that four circuits disagree within themselves as well as disagree with each other over the proper standard of review. See, *e.g.*, *Dickens* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950); *Maggio* v. *Zeitz*, 333 U.S. 56, 59-60 (1948); see also *Scarborough* v. *United States*, 431 U.S. 563, 567 n.4 (1977).

B. *Waiver.* Hudson asserts that petitioners have waived the opportunity to have this Court resolve the conflict because petitioners did not raise the conflict until the petition for rehearing. (Hudson's Opp. 8-10.) In fact, rehearing was the first appropriate occasion to raise the conflict.

When this appeal was taken, the findings of fact actually made by the district court—if not erroneous—would have defeated a *prima facie* case. For example, if it were true, as the district court found, that no vacancies existed, then petitioners could not establish a *prima facie* case of discrimination respecting promotions or transfers. Thus, in briefing this appeal, petitioners needed to demonstrate, and did demonstrate, that the district court's findings were clearly erroneous.

When the court of appeals made new, supplementary findings and attributed them to the district court, that introduced the question of whether, in light of the new findings, petitioners' evidence was sufficient to establish a *prima facie* case. For example, once the court of appeals found that there were 17 vacancies in the baler position, but 15 vacancies were filled on the basis of "temporary" seniority, the question arose whether petitioners' proof was sufficient to establish a *prima facie* case with respect to at least two of the vacancies. The court of appeals erroneously resolved this issue by applying the clearly erroneous standard.[4] Thereafter, petitioners pointed out to the court that its decisions were in conflict.

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[4] Hudson argues that petitioners hoped to sandbag the court of appeals by not raising the conflict: "no matter which standard the court applied, petitioners could later argue that the standard is in dispute and the court should perhaps have applied the other standard." (Hudson's Opp. 10.) If the court of appeals had affirmed the judgment below using the plenary review standard, petitioners could not possibly hope to prevail by asking that the clearly erroneous standard be substituted because that standard grants significant deference to the district court.

In short, contrary to Hudson's contention, this is not a case where the petitioners are asserting new claims for relief that were not timely raised in the court below.

II. The Appellate Fact-Finding

The panel majority ignored this Court's decisions which hold that a court of appeals may not make its own findings of fact in order to supplant clearly erroneous findings made by the district court. Specifically, the panel majority found, in the first instance, (1) that plaintiffs "were aware that Hudson was actively encouraging women to apply for positions" (App. to Pet. for Cert. 7a) and (2) that there were 17 vacancies in the baler position, 15 of which were filled by men with "temporary" seniority in the positions. (*Id.* at 10a-11a.) No one has tried to demonstrate that there was any justification for refusing to assign females to at least two of the baler jobs. Instead, Hudson tries to defend the appellate fact-finding with several unusual arguments.

Hudson mischaracterizes petitioners' argument as an attack on the adequacy, not the accuracy, of the district court's findings. (Hudson's Opp. 14.)[5] Hudson thus claims that petitioners waived their complaints about the district court's findings by failing to ask the district court to amend its findings. In fact, petitioners are attacking the court of appeals' findings. That court had no business making supplemental findings, whether those findings were intended to replace clearly erroneous findings entered by the district court or to clarify vague or inadequate findings of the district court.

Hudson argues that "[t]he idea that the District Court did not make any findings as to the 'petitioners' justifiable belief about the supposed futility of applying for transfers' is quite amazing." (Hudson's Opp. 14.) That "amazing" idea was harbored by Judge Clark in dissent

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[5] Contrary to Hudson's assertion (Hudson's Opp. 14), petitioners did argue in the court of appeals that the district court's findings were clearly erroneous and tainted by an incorrect view of the law.

where he states that: "The district court made no finding as to the state of mind of appellants." (App. to Pet. for Cert. 20a.)[6] Moreover, as Judge Clark points out, the detailed findings made by the court of appeals on petitioners' justifiable belief (App. 7a-9a) are not found anywhere in the district court's opinion. (App. 25a, 26a, 29a.)

On the promotions issue, it is plain that only the court of appeals found that there were 17 vacant baler positions in the relevant period and that 15 of those positions were filled by men with "temporary" seniority. The Company tries to minimize the importance of these appellate findings. Thus, it says that these findings are based on company records introduced by petitioners rather than on oral testimony. (Hudson's Opp. 16, n.13.) There is no requirement, however, that a plaintiff put all of its case in evidence through oral testimony.

Hudson also argues that the finding by the court of appeals that 15 of the 17 vacancies in the baler position were filled by men with temporary seniority is simply a restatement of the district court's finding that there were no vacancies for balers at all. (Hudson's Opp. 17.) This argument is just plain wrong; indeed, even on the court of appeals' own terms, there were at least two vacancies that were not offered to petitioners although their rights to these jobs were indisputably superior to those of the men who were selected.

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[6] Judge Clark also noted that "[i]n fact, all [appellants] testified that they did not think that they were allowed to work anywhere in the plant but in the jobs historically assigned to women." (App. to Pet. for Cert. 20a, n.2.)

[7] The unions assert that they should not be parties to this case any longer because there was no evidence in the record of discrimination by the unions. (Unions' Opp. 10, 12.) A union which has not violated Title VII may nonetheless be retained in a lawsuit as an indispensable party under Federal Rule of Civil Procedure 19(a), to ensure that full relief is granted. See *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 356 n.43 (1977).

CONCLUSION

The panel majority in this case chose to serve as the fact-finder as well as the reviewing court, notwithstanding this Court's denunciations of that practice. (See cases cited Pet. for Cert. 15-18.) Accordingly, it would be appropriate for this Court to grant *certiorari* and summarily reverse the court of appeals with instructions to vacate its supplementary findings, and to reverse the district court's judgment because it rests on findings that are clearly erroneous. Alternatively, this Court should grant the writ and set the case for briefing on the merits.

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